OFFICE COPY

APPENDIX

In the Supreme Court of the United States

October Term, 1971

No. 71-308

United States of America, *Petitioner*

v.

Marian A. Byrum, *Executrix Under the Last Will and Testament of Milliken C. Byrum, Deceased*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
FILED AUGUST 30, 1971
CERTIORARI GRANTED NOVEMBER 9, 1971

In the Supreme Court of the United States

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INDEX

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date: February 7, 1968.

Title of Case

MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF MILLIKEN C. BYRUM, DECEASED

vs.

THE UNITED STATES

DOCKET ENTRIES

Date	Proceedings
2- 7-68	Complaint, filed.
2- 7-68	Summons and copy complaint issued to the United States Marshal.
2-27-68	Summons returned executed, filed. Fee $3.00.
4- 8-68	Answer filed.
7-16-68	Pltf's Motion for Summary Judgment—Memo filed.
8- 9-68	Entry—USA is granted leave to file its memo. contra to motion for summary judgment on or about Sept. 14, 1968, filed.
9-13-68	Defdt's Motion for Summary Judgment filed.
10- 2-68	Defdt's Memo in Support filed.
10-21-68	Pltf's Reply Memo filed.
4-16-70	Opinion and Order—Pltf's Motion for Summary Judgment GRANTED; Defdt's Motion for Summary Judgment DENIED; Defdt is ORDERED to refund $13,202.45 with interest filed.
6-10-70	Notice of Appeal filed.
6-10-70	Record transferred to US Court of Appeals at Cincinnati, Ohio.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

Case No. 20,526

Date 1970	Filings—Proceedings
Jun. 11	*Certified record* (1 vol. pleadings), filed; and cause docketed
Jun. 15	Appearance of counsel for Appellant
Jun. 16	Appearance of counsel for Appellant
Jun. 17	Appearance of counsel for Appellee
Jun. 22	Appearance of counsel for Appellant
Jun. 22	Statement of Appellant as to the issue to be presented on appeal and designation of record for the appendix
July 13	Motion: Appendix and Brief for Appellant to 8/21/70 (Granted)
Aug. 14	Motion: Appellant's brief to 9/8/70 (Granted)
Aug. 18	Ten copies of Appendix
Sept. 4	Twenty-five copies of Brief for Appellant
Sept. 4	Proof of service of brief for Appellant
Oct. 5	Twenty-five copies of Brief for Appellee
Oct. 5	Proof of service of brief for Appellee
Dec. 18	Caused argued and submitted (Before: Phillips, Brooks and O'Sullivan, JJ.)
Dec. 22	Three copies of Opinion of the Tax Court in Harry H. Beckwith v Commissioner from counsel for Appellee (Distributed to the Court).
1971	
Apr. 8	Judgment of the District Court affirmed
Apr. 8	Opinion by Brooks, J. (Phillips, J., dissenting)
Apr. 30	Mandate issued (No costs taxed) Opinion with mandate
July 20	Copy of order by the Supreme Court of the United States dated 6/28/71 extending the time for filing petition for writ of certiorari to and including 9/4/71
Sept. 3	Notice of filing petition for certiorari 8/30/71 (SC No. 71-308)
Nov. 15	Certified copy of order of the Supreme Court granting certiorari

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 68-42

Marian A. Byrum, Executrix under the Last Will and Testament of Milliken C. Byrum, Deceased,
Plaintiff,

vs.

The United States,
Defendant.

COMPLAINT

1. Plaintiff is Executrix under the Last Will and Testament of Milliken C. Byrum, Deceased, late of the County of Franklin, State of Ohio, having been duly appointed as such by the Probate Court of the County of Franklin, State of Ohio, on the 2nd day of October, 1964, and duly qualified as such Executrix and has ever since acted and is now acting thereas, and resides in Orient, Franklin County, Ohio and is a citizen of the United States and jurisdiction is conferred upon this Court by Title 28 U.S.C.A., Section 1346(a).

2. This action arises under Section 2036 of the Internal Revenue Code of 1954 and plaintiff has a just claim against defendant for the sum of $13,202.45, together with interest as provided by law.

3. That on the 29th day of October, 1965, plaintiff filed the Estate Tax return for the estate of the above named decedent in accordance with the provisions of law for the execution and filing thereof, with the District Director of Internal Revenue, Cincinnati, Ohio and at such time and

place paid to said Director the sum of $9,938.16, the amount shown by said return to be due and payable.

4. That said return was duly audited and on the 21st day of June, 1967, the District Director of Internal Revenue mailed to plaintiff a notice of additional Federal tax due of $13,202.45, which sum plaintiff paid to the District Director of Internal Revenue at Cincinnati, Ohio, on the 28th day of June, 1967. A copy of said notice of additional Federal tax due is annexed hereto and marked Exhibit A.

5. That thereafter and on the 1st day of August, 1967, plaintiff filed with the District Director of Internal Revenue aforesaid in accordance with the statute, a claim for the refund of the said sum of $13,202.45 and interest and duly demanded the refund and payment of said amount, together with interest as provided by law. A copy of said claim for refund is annexed hereto and marked Exhibit B.

6. That on the 2nd day of November, 1967, plaintiff filed a Waiver of Statutory Notification Of Claim Disallowance with the District Director of Internal Revenue aforesaid; that in addition more than six months have expired since the filing of said claim for refund and the commencement of this suit. A copy of said Waiver Of Statutory Notification Of Claim Disallowance is annexed hereto and marked Exhibit C.

7. That said deficiency or additional Federal tax due was based upon the determination by the District Director of Internal Revenue that the taxable estate of decedent for the purposes of the Internal Revenue Code of 1954 was $106,669.30.

8. That in determining the taxable estate, the District Director of Internal Revenue erroneously and illegally included in the gross estate of the decedent corporate stock of the total value of $89,300.00 transferred irrevocably by decedent during his lifetime to a trust, on the basis that the transfer of said corporate stock were transfers under which decedent retained for his life an interest in the transferred property within the meaning of Section 2036 of the Internal Revenue Code of 1954.

9. That no part of the said sum of $13,202.45, the amount of the tax erroneously and illegally collected from plaintiff has been refunded to plaintiff.

WHEREFORE, plaintiff demands judgment against de-

fendant for the sum of $13,202.45, together with interest as provided by law.

/s/ LARRY H. SNYDER
CHAMBLIN, SNYDER & HENRY
Attorneys for Plaintiff
209 South High Street
Columbus, Ohio 43215

The Plaintiff hereby demands a trial by jury of the issues in the within action.

(CAPTION OMITTED)

ANSWER

The defendant, the United States of America, by its attorney, Robert M. Draper, Esquire, United State Attorney for the Southern District of Ohio, answers the complaint as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Denies the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Admits the allegations contained in paragraph 5 of the complaint, except denies every material allegation contained in said claim for refund unless otherwise specifically admitted.

6. Admits the allegations contained in paragraph 6 of the complaint.

7. Denies present information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

8. Denies the allegations contained in paragraph 8 of the complaint.

9. Denies that any tax was illegally or erroneously assessed or collected from the plaintiff, but admits that no refund has been made of taxes paid by plaintiff.

WHEREFORE, defendant prays for judgment in its favor, dismissing plaintiff's complaint with prejudice and awarding defendant its costs and such other and further relief as to the Court seems proper.

....

United States Attorney

(CAPTION OMITTED)

MOTION FOR SUMMARY JUDGMENT

Complainant, Marian A. Byrum, Executrix of the estate of Milliken C. Byrum, deceased, moves the Court for a summary judgment in her favor upon the complaint and answer herein, for the reason that there is no genuine issue as to any material fact and she is entitled to a judgment as a matter of law.

....

CHAMBLIN, SNYDER & HENRY
209 South High Street
Columbus, Ohio 43215
Attorneys for Complainant

(CAPTION OMITTED)

MOTION FOR SUMMARY JUDGMENT

(Filed October 8, 1968.)

The defendant, the United States of America, by its attorney, Robert M. Draper, the United States Attorney for the Southern District of Ohio, moves this Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, a summary judgment in the defendant's favor dismissing plaintiff's complaint on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. This motion is based upon the consideration and authorities set forth in the memorandum in support of the defendant which will be submitted to the Court on or before October 1, 1968.

....

ROBERT M. DRAPER
United States Attorney

(CERTIFICATE OMITTED)

TRUST AGREEMENT

THIS AGREEMENT made at Columbus, Ohio, this 9th day of December 1958 between Milliken C. Byrum of Franklin County, Ohio (hereinafter called the "Grantor") and The Huntington National Bank of Columbus, Columbus, Ohio (hereinafter called the "Trustee") WITNESSETH:

Article I. The Trust Estate. Byrum Trust No. 2.

Grantor, being desirous of immediately creating a trust and trust estate to be known as Byrum Trust No. 2, comprised of 165 shares of the Class A Common Stock of Byrum Lithographing Co., Inc., in consideration of the agreement of Trustee to accept the duties and responsibilities imposed upon it as such Trustee by the terms and provisions of this Trust Agreement, and other valuable consideration the receipt of which is hereby acknowledged, said Grantor hereby delivers to Trustee said property above described.

Article II. Additions To The Trust Estate.

Grantor, and any other person, by inter vivos gifts, or by Last Will and Testament may, transfer, assign, set over and deliver to Trustee, additional property, real or personal, or both, to become a part of the Trust Estate herein created and may make Trustee the beneficiary under life insurance policies covering the life of Grantor or any other person and any and all such additions to the Trust Estate shall be received, dealt with and administered by the Trustee in all respects as if the same had been transferred to the Trustee, concurrently herewith. Any instrument of assignment, transfer or conveyance which refers to this Trust Agreement and describes or identifies the property, rights or interest to be conveyed to the Trustee, which is duly signed by Grantor or by any other person making such gift or bequest, shall be sufficient to make the same a part of this Trust Estate and subject to all of the covenants, terms, provisions and conditions of this Trust.

Article III. Habendum.

To have and to hold such shares and all other property

now or hereafter conveyed to Trustee or added to this Trust, together with all of the dividends and proceeds from all stocks and other securities and all of the rents, income, issues, gains and profits arising from all of said property, real and personal, to the Trustee, or its successors in the Trust hereby created, but in the Trust nevertheless for the uses and Trusts and subject to the provisions herein set forth.

Article IV. Irrevocable Trust.

This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

Article V. Powers Of The Trustee.

The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon or vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

Retain Assets. 5.01 To retain and continue to hold, in the Trustee's discretion, as a part of the Trust Estate any investment or property; to buy any assets desired from the estate of the Grantor.

Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal, at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

Claims. 5.03 To enforce, abandon, defend

against, or have adjudicated by legal proceedings, arbitration or by compromise, any claim or demand whatsoever arising out of or which may exist against the Trust Estate.

Nominee.

5.04 To cause any property comprising a part of the Trust Estate to be issued, held or registered in the Trustee's own name without disclosing the fiduciary relationship, in Trustee's name as Trustee, in the name of Trustee's nominee or in such other form that title will pass by delivery.

Investments.

5.05 To invest any money in the Trust Estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to the character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

Voting.

5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that, during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

Counsel.

5.07 To employ and follow the advice

of counsel and agents and to determine and pay to them reasonable compensation, whether from principal or income, as the Trustee shall decide.

Taxes.

5.08 The Trustee is given broad, discretionary powers to use the proceeds of insurance or other funds held by it; to pay any part or all of the Federal estate and State inheritance taxes levied upon Grantor's estate and that of his said wife; to advance funds to the executor or administrator of the respective estates, with or without security, and to purchase assets, real or personal, from each estate; to pay all taxes, assessments, costs, insurance charges and other expenses arising in connection with the administration of the Trust Estate, including taxes under the estate of the Grantor and reasonable compensation to the Trustee, its agents and attorneys, and to determine whether and to what extent such taxes, assessments, costs, charges and expenses shall be deducted from and charged against income or principal.

Leases.

5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases, renewable forever.

Corporate Reorganization.

5.10 To consent to the reorganization, consolidation, readjustment of the financial structure, or sale of the assets, of any corporation or other organization, the stocks or securities of which are owned by the Trustee, and to take any

action with reference to such stocks or securities, which, in the opinion of the Trustee, is necessary to obtain the benefit of any such reorganization, consolidation, readjustment or sale; to exercise any conversion privilege or subscription right given to it as the owner of any property constituting a portion of the Trust Estate; to accept and hold as a part of the Trust the securities or stocks resulting from any such reorganization, consolidation, readjustment, sale, conversion or subscription.

Real Estate.

5.11 To manage, improve, protect, exchange, partition, contract to sell and sell on any reasonable terms, convey with or without convenants of warranty, dedicate for public purposes, subdivide, or vacate for subdivision, make party wall contracts and agreements, grant easements or changes of any kind, construct, remodel, alter, repair and maintain buildings, upon any real estate which may at any time be a part of the Trust Estate.

Borrow.

5.12 To borrow money from time to time, without personal liability, for any purpose in the administration of this Trust and for the purpose of making advancements or loans to the executor or administrator of Grantor's estate, or to continue or renew any loans made to the Trustee as in said Trustee's judgment shall deem wise and expedient and for the purposes herein set forth.

Income Allocation.

5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

Court Approval.

5.14 The Trustee shall not be required to obtain the authority or approval of any court for any act which it may desire to do in the administration or management of the Trust Estate, or in the disbursement, investment or reinvestment, or management of the trust funds.

Limitation.

5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

Article VI. Distribution Prior To Age 21.

Until my youngest living child reaches the age of twenty-one (21) years, the Trustee shall exercise absolute and sole discretion in paying or applying income and/or principal of the Trust to or for the benefit of Grantors child or children and their issue, with due regard to their individual needs for education, care, maintenance and support and not necessarily in equal shares, per stirpes. The decision of the Trustee in the dispensing of Trust funds for such purposes shall be final and binding on all interested persons.

Article VI. Division At Age 21.

When my youngest child reaches the age of twenty-one (21) years, the corpus of the Trust Estate shall be divided into as many equal Trust funds as there are then living and/or deceased children of the Grantor. The division of the fund into separate trusts shall be based upon the assets in the fund at the time of such division without regard for any disparity of payments or application of income and/or principal of the fund among the beneficiaries during the preceding period. If, at the time of such division, any child

of Grantor shall be deceased with issue surviving or then conceived and without having validly exercised the Power of Appointment hereinafter granted, the Trust for such deceased child shall be established for his or her issue. If, however, at the time of such division, any child of the Grantor shall be deceased without issue surviving and without having validly exercised the power of appointment hereinafter granted, then the Trust for such deceased child shall not be established and the property which would have otherwise been distributed to such Trust shall be divided equally between the Trusts for the other children of Grantor or their issue or their appointees, as the case may be. The term "children" as used herein shall be deemed to mean Allen L. Byrum, Janet A. Byrum, James R. Byrum, children of the Grantor now living, and any children hereafter born.

Expenses. 6.01 The Trustee shall pay from the income received by it from each Trust Fund, the costs, charges and expenses of administering that particular Trust Fund, including the compensation of the Trustee, and all taxes levied against the particular Trust Fund or against the Trustee on account of said Trust Fund, or any part thereof, and after the payment thereof, the remaining income shall be credited to said Trust Fund.

Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

Article VII. Termination.

Upon the death of a son or daughter who is the bene-

ficiary of a fund, or if a son or daughter shall be deceased at the time the fund for his or her issue or appointee is established, the net income of his or her fund shall be divided by the Trustee among the issue of the deceased son or daughter, per stirpes, unless he or she shall designate in his or her Last Will and Testament that his or her spouse and/or issue shall receive and enjoy all or any portion of the net income and/or corpus, in which event the net income and/or corpus shall be paid by the Trustee to those designated in such manner and amounts as provided in said Last Will and Testament. If said son or daughter dies without validly exercising the power of appointment herein granted and without issue, then said corpus shall be retained by the Trustee for the Trust or Trusts established for the benefit of any other surviving children of the Grantor or their issue as herein provided; and if none, then the corpus be distributed to the other children or issue of the Grantor, per stirpes.

Each Trust created herein shall terminate when the son or daughter of Grantor, who is the beneficiary of said Trust, has attained the age of thirty-five (35) years and the property then comprising ~~it~~ shall be distributed to said beneficiary. If said beneficiary dies before attaining the age of thirty-five (35) years, said Trust shall terminate when said deceased son or daughter would have attained the age of thirty-five (35) years had he or she lived. If at the time said Trust is terminated, there shall be no issue then living of said beneficiary, the property comprising the said Trust Fund shall be paid and distributed to the issue of the Grantor, per stirpes; provided, however, that in the event any portion of said fund is distributable to Grantor's issue for whom Trust Funds are then in existence under this Agreement, such distribution shall be added to such Trust Funds.

Article VIII. Removal Of Trustee.

If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these

trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Columbus, Ohio, Trustee.

Grantor, prior to his death, and after the death of the Grantor, the Grantor's wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

Article IX. Miscellaneous Provisions.

Minor. 9.01 If any beneficiary shall be a minor at the time he or she is entitled to receive payments of income under the terms of this Trust, the Trustee is fully authorized and empowered to pay such income to him or her or for his or her benefit without the necessity for the appointment of a legal guardian.

Discretion. 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem advisable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payments shall be binding on all persons.

Spendthrift. 9.03 If, because of any alienation or attempted alienation by the beneficiary

of any interest or right to receive payments under any Trust hereby created, or if, from any cause whatsoever, such payments or any part thereof shall, or but for this proviso would, at any time become payable to or pass to or for the benefit of any person other than such beneficiary, then the interest in and the right of such beneficiary to receive such payments shall cease and determine and thereafter said payments, or such part thereof as shall become so forfeited by such beneficiary, shall be applied as determined by the Trustee in its uncontrolled discretion to the use of any other beneficiary or beneficiaries in such manner and portions as such Trustee may deem best; provided, further, that notwithstanding any forfeiture by a beneficiary as aforesaid, said Trustee in its uncontrolled discretion, but without any obligation so to do, may from time to time apply or direct the application of said portion of such payments forfeited as aforesaid, or so much thereof as to it deems best, to the use of the beneficiary so forfeiting the same.

Issue Under Age 21.

9.04 In the event that any issue of the children of the Grantor shall not have attained the age of twenty-one (21) years at the time he shall be entitled to distribution of any part of the corpus, whether by the terms of this Agreement or by virtue of the exercise of the power of appointment hereinbefore granted to the Grantor's children, such distribution shall be postponed and the Trust as herein provided shall continue until such issue shall have attained the age of twenty-one (21) years. Until such issue shall have attained the age of twenty-one (21) years, the Trustee shall pay such

part or amount of income and principal as the Trustee, in its sole judgment and discretion, shall determine and said Trustee shall be fully authorized and empowered to pay such amounts of income or principal to him or her or for his or her benefit without the appointment of a legal guardian.

Ultimate Termination.

9.05 All Trusts created hereunder shall in no event terminate later than twenty-one (21) years after the death of the last survivor of Grantor, his wife, and the Grantor's issue living at the date of his death.

Contingent Beneficiary.

9.06 At the time of termination should there be no persons as heretofore provided to receive distribution of the fund or funds established hereunder, then distribution shall be made to Byrum Lithographing Co., Inc., an Ohio corporation or its successor, free of Trust.

IN WITNESS WHEREOF, I, Milliken C. Byrum, have hereunto set my hand and said The Huntington National Bank of Columbus, Columbus, Ohio, to evidence its acceptance of the trusts herein expressed has hereunto set its hand and seal by its duly authorized officer, on the day and year first above written.

SIGNED IN THE PRESENCE OF:

....

....

....

....

.... GRANTOR
Milliken C. Byrum
THE HUNTINGTON NATIONAL
BANK OF COLUMBUS, TRUSTEE

BY ....
Trust Officer

(CAPTION OMITTED)

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

L. E. Green, being first duly sworn says that he is Assistant Vice-President and Trust Officer of The Huntington National Bank of Columbus, Columbus, Ohio, trustee under the trust created by the Trust Agreement of December 9, 1958, between Milliken C. Byrum and The Huntington National Bank of Columbus and that the attached instruments entitled "Principal Ledger," "Income Cash Ledger" and "List of Assets As Of The End Of The Year," were compiled and prepared under his supervision from the records of The Huntington National Bank of Columbus pertaining to the Milliken C. Byrum Trust, and that these instruments show all of the receipts of, and disbursements from, said trust and the assets comprising the trust corpus for the periods therein referred to.

That during the period from December 9, 1958, to September 5, 1964 there were no distributions to or on behalf of the beneficiaries or any one or more beneficiary from trust income or principal, nor was any request made by any beneficiary for a distribution of income or principal, and that the only payments from trust funds during this period were for the expenses of administering such trust.

/s/ L. E. GREEN

(NOTARIZATION OMITTED)

SHEET No. 1 THE HUNTINGTON NATIONAL BANK OF COLUMBUS TRUST No. LT-706

COLUMBUS, OHIO

NAME Byrum, Milliken C

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR. INVESTED DR.	PRINCIPAL BALANCE CR. UNINVESTED DR.
[illegible]	BY DEPOSIT-BYRUM LITHOGRAPHING CO INC CLASS A NO PAR COMMON STOCK RECEIVED CTF #A131 FOR 165 SHARES REG N/O CAREY & CO		165 00		165 00*	00*
[illegible] 5'59	PURCHASED 25 MATURITY VALUE U S OF A SAV BONDS SER E DUE 9-1-68 THRU THE HUNTINGTON NATIONAL BANK 25 PAR AT [illegible]		18 75		183 75*	18 75
OCT 5'59	DEPOSIT			2 25	183 75*	16 50
OCT 5'59	TRANSFERRED FROM INCOME CASH A/C			16 50	183 75*	00*
DEC21'59	BY DEPOSIT - 188 SHARES GRAPHIC REALTY INC CLASS A COMMON CERT #AG1 AT 60 SHARES AG2 AT 128 SHRS REG N/O CAREY & CO		188 00		371 75*	00*
[illegible]	BY DEPOSIT - 240 SHARES BYCHROME CO CLASS "A" COMMON CAPITAL CERT #A23 AT 220 SHARES A24 AT 20 SHRS REG N/O CAREY & CO		240 00		611 75*	00*
[illegible]23'60	BY DEPOSIT 61 SHARES BYCHROME CO CLASS A COMMON CTF #A33 AT 60 SHARES & CTF #A34 AT 1 SHAREREG N/O C AREY & CO (1 SHARES MARIAN A BRYUM) (60 SHARES M C BRYUM)		61 00		672 75*	00*

FORM [illegible]

FWD

TRUST NO. LT-706

SHEET NO. 2

NAME Byrum, Milliken C

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

TRUST No. LT-706

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR. INVESTED DR.	PRINCIPAL BALANCE CR. UNINVESTED DR.
	FWD				672 75*	00*
[illegible] 20'60	BY DEPOSIT 32 SHARES GRAPHIC REALTY INC CLASS A COMMON CTF #A71 AT 30 SHARES & CTF #A72 AT 2 SHARES (2 SHARES MARIAN A BRYUM) 130 SHARES M C BRYUM)		32 00		704 75*	C
[illegible]P 14 '60	BY DEPOSIT 15 SHS BYRUM JONES INC COM CTF #9 FOR 15 SHS REG N/O CAREY & CO		168 75		873 50*	00*
[illegible]P 14 '60	PUR 42 SHS BYRUM JONES INC COM THRU BYRUM LITHOGRAPHING CO INC 11.25 PER SHR		472 50		1346 00*	472 50*
[illegible]P 14 '60	TFD FROM INCOME CASH ACCOUNT FOR REINVESTMENT			68 60	1346 00*	403 90*
[illegible]P 14 '60	DEPOSIT FROM M C BYRUM			384 99	1346 00*	18 91*
[illegible]P 23 '60	U S OF A SAV BOND SER E DUE 9-1-68 PROCEEDS FROM THE REDEMPTION OF 25 PAR VAL AT 18.75			18 75	1327 25*	16*
[illegible]P 23 '60	TFD FROM INCOME CASH ACCOUNT			16	1327 25*	00*
[illegible]	TRANSFERRED FROM INCOME ACCOUNT			105 00	1327 25*	105 00
[illegible]	PURCHASED 3 SHARES OF BYRUM-JONES INC AT $35 PER SHARE		105 00		1432 25*	00*
[illegible] 20 [illegible]	BY DEPOSIT 25 SHARES BYRUM-JONES INC CAPITAL STOCK CTF #18 REG N/O CAREY & CO GIFT FROM MILLIKEN BYRUM		875 00		2307 25*	00*

FORM 529

TRUST NO. LT-706

SHEET No. 3
NAME Byrum, Mi lliken C

Affidavit of L. E. Green — Principal Ledger

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

TRUST No. LT-706

PRINCIPAL LEDGER

320 015 00 1

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR. INVESTED DR.	PRINCIPAL BALANCE CR. UNINVESTED DR.
	FWD (10-20-61)					
[illegible] 20 61	BY DEPOSIT 56 SHARES GRAPHIC REALITY INC CLASS A COMMON STOCK CTF #A99 AT 44 A1CO AT 12 SHARES REG N/O CAREY & CO 12 SHARES MARIAN A BYRUM				2307 25*	00*
			2323 44		4630 69*	00*
[illegible] 19 61	BY DEPOSIT 7 SHRAES SYCIRGME CO CLASS A NO PAR COMMON STOCK CTF #A39 REG N/O CAREY & COMPANY (ACQ 9-15-61)		398 09		5028 78*	00*
[illegible] 18 62	CASH RECEIVED .10 FUNDS TRANSFERRED FROM INCOME CASH ACCOUNT $74.90			75 00	5028 78*	75 00*
[illegible] 19 62	PURCHASED $100.00 PAR US OF A SAVINGS BOND SER E DUE 6-1-70 THRU THE HUNTING NATIONAL BANK PF COLS BOND DEPT		75 00		5103 78*	00*
[illegible] 23 63	PURCHASED 100.00 MATURITY VALUE US OF A SAVINGS BONDS SERIES E DUE 5-1-71 THRU THE HUNTINGTON NATIONAL BANK AT 75				5178 78*.	
			75 00		~~5103 78*~~	75 00
[illegible] 23 63	DEPOSIT FROM M C BYRUM			75 00	5178 78*	00*
8-31 64	FUNDS TRANSFERRED FROM INCOME CASH ACCOUNT FOR INVESTMENT			74 90	5178 78*	74 90*
8-31 [illegible]	BY DEPOSIT [illegible] CASH			10	5178 78*	75 00*
	FWD					

SHEET No. 4

NAME Byrum, Milliken C.

THE HUNTINGTON NATIONAL BANK OF COLUMBUS
COLUMBUS, OHIO

TRUST No. LT-706
320 015 00 1

PRINCIPAL LEDGER

DATE	DESCRIPTION	PROFIT OR LOSS	INVESTMENTS RECEIVED CASH DISBURSED	INVESTMENTS DELIVERED CASH RECEIVED	PRINCIPAL BALANCE CR. INVESTED DR.	PRINCIPAL BALANCE CR. UNINVESTED DR.
	FWD				5178 78*	75 00*
8-31 64	PURCHASED $100.00 PAR VAL. U S OF A SAVINGS BOND SERIES E ISSUED 8-1-64 THRU THE HUNTINGTON NATIONAL BANK OF COLUMBUS BOND DEPARTMENT		75 00		5253 78*	00*
6-7 65	SOLD 85 SHS BYRUM-JONES INC THRU CHAMBLIN SNYDER AND HENRY AT 2.00	1451 25		170 00	~~5083 78*~~ 3632 53	170 00*

SHEET No. 1 THE HUNTINGTON NATIONAL BANK OF COLUMBUS TRUST No. LT-706

COLUMBUS, OHIO

NAME ~~XXXXXXXXXXXXXXXXX~~ Byrum Milliken C

INCOME CASH LEDGER

DATE	DESCRIPTION		DISBURSED DEBIT	RECEIVED CREDIT	CASH BALANCE DEBIT
[illegible] 9 59	BYRUM LITHOGRAPHING CO CIN DUE AS OF 6-30-59 165 SHARES AT .10 PER SHARE			16 50	16 50
[illegible] 9 59	TRANSFER TO PRINCIPAL FOR RE-INVESTMENT		16 50		00
[illegible]P14'60	BY CHROME CO CLAA (A) CASH DIVIDEND AS OF JUNE 30 1960 ON 301 SHARES AT .10 PER SHARES			30 10	
[illegible]P14'60	BYRUM LITHOGRAPHING CO INC CLASS (A) CASH DIVIDEND AS OF JUNE 30-1960 ON 165 SHARES AT 10 PER SHARE			16 50	
[illegible]P14'60	GRAPHIC REALTY INC CLASS (A) CASH DIVIDEND AS OF JUNE 30 1960 ON CASHSHARES AT .10 PER SHARE			22 00	68 60
[illegible]P14'60	TRANSFER TO PRINCIPAL CASH ACCOUNT FOR REINVESTMENT		68 60		00
[illegible]P23'60	INCREMENT DERIVED FROM THE REDEMPTION OF 25 PAR VALUE U S OF A SAV BONDS SER (E) DUE 9-1-68			16	16
[illegible]P23'60	TRANSFER TO PRINCIPAL CASH ACCOUNT		16		00
[illegible]14'61	BY CHROME COMPANY CLASS (A) CASH DIVIDEND AS OF JUNE 30 1961 301 SHARES CLASS (A) AT 10¢ PER SHARES	30.10			
	BYRUM LITHOGRAPHING COMPANY INC CASH DIVIDEND AS OF JUNE 30 1961 165 CLASS (A) SHS AT 10¢ PER SHARE	16.50			
	GRAPHIC REALTY INC CASH DIVIDEND AS OF JUNE 30 1961 220 CLASS (A) SHARES AT 10¢ PER SHARE	22.00		68 60	
[illegible]14'61	BYRUM-JONES INC CASH DIVIDEND AS OF JUNE 30 1961 57 SHARES AT 25¢ PER SHARE	14.25			
	BY DEPOSIT - VOUCHER FROM M. C. BYRUM	22.15		36 40	105 00
[illegible]14'61	TRANSFER TO PRINCIPAL ACCOUNT		105 00		00
[illegible]	BYRUM-LITHOGRAPHING CO INC-DIVIDEND ON 165 SHARES CLASS A COMMON STOCK AT .10 A SHARE----------------------	16.50			
	GRAPHIC REALITY INC-DIV ON 276 CLASS A COMMON STOCK AT .10 A SHARE----------------------------------	27.60			
	BY CHROME CO-DIVIDEND ON 308 SHARES CLASS A COMMON STOCK AT .10 A SHARE---------------------------	30.80		74 90	74 90

FWD TRUST NO. LT-706

Affidavit of L. E. Green – Income Cash Ledger

SHEET No. 2 THE HUNTINGTON NATIONAL BANK OF COLUMBUS TRUST No. LT-706

COLUMBUS, OHIO

NAME Byrum Milliken C

320 015 00 1

INCOME CASH LEDGER

DATE	DESCRIPTION		DISBURSED DEBIT	RECEIVED CREDIT	CASH BALANCE DEBIT
	FWD				74 90*
[illegible]	FUNDS TRANSFERRED TO PRINCIPAL CASH ACCOUNT		74 90		00*
3-31 [illegible]	DIVIDENDS FOR FOLLOWING				
	BY CHROME CO CLASS A DIV 308 SHS AT .10	30.80			
	BYRUM LITHOGRAPHING CLASS A DIV 165 AHS AT .10	16.50			
	GRAPHIC REALTY INC. DIV 276 SHS AT .10	27.60			
		74.90		74 90	74 90*
3-31 [illegible]	FUNDS TRANSFERRED TO PRINCIPAL CASH ACCOUNT FOR INVESTMENT		74 90		00*
4- 8 '65	BYRUM LITHOGRAPHING CO DIV 165 SHS AT 2.00	330.00			
	GRAPHIC REALTY INC CLASS A DIV 276 SHS AT 2.00	552.00			
	BYCHROME CLASS A DIV 308 SHS AT 2.00	616.00		1498 00	1498 00*

FORM NO [illegible] TRUST NO. LT-706

YEARLY LIST OF ASSETS
AS OF THE END OF THE YEAR

BYRUM, MILLIKEN C.
Trust #320 015 00 1

Year	No. of Shares	Description
1958	165	Byrum Lithographing Co., Inc., Class A Common Stock
1959	165	Byrum Lithographing Co., Inc., Class A Common Stock
	188	Graphic Realty Inc., Class A Common Stock
	$25 par val	U.S. of A. Savings Bonds Series E due 9-1-68
	240	Bychrome Co., Class A
1960	165	Byrum Lithographing Co., Inc., Class A Common Stock
	220	Graphic Realty Inc., Class A Common Stock
	57	Byrum Jones Inc., Common Stock
	301	Bychrome Co., Class A
1961	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	308	Bychrome Co., Class A
1962	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	308	Bychrome Co., Class A
	$100 par val	U.S. of A. Savings Bonds Series E due 6-1-70

Year	No. of Shares	Description
1963	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	$100 par val	U.S. of A. Savings Bonds Series E due 6-1-70
	$100 par val	U.S. of A. Savings Bonds Series E due 5-1-71
	308	Bychrome Class A
1964	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	85	Byrum Jones Inc., Common Stock
	$100 par val	U.S. of A. Savings Bonds Series E due 6-1-70
	$100 par val	U.S. of A. Savings Bonds Series E due 5-1-71
	$100 par val	U.S. of A. Savings Bonds Series E due 8-1-64
	308	Bychrome Class A
1965	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	$100 par val	U.S. of A. Savings Bond Series E due 6-1-70
	$100 par val	U.S. of A. Savings Bond Series E due 5-1-71
	$100 par val	U.S. of A. Savings Bond Series E due 8-1-64
	308	Bychrome Class A

Year	No. of Shares	Description
1966	165	Byrum Lithographing Co., Inc., Class A Common Stock
	276	Graphic Realty Inc., Class A Common Stock
	$100 par val	U.S. of A. Savings Bond Series E due 6-1-70
	$100 par val	U.S. of A. Savings Bond Series E due 5-1-71
	$100 par val	U.S. of A. Savings Bond Series E due 8-1-64
	308	Bychrome Class A

(CAPTION OMITTED)

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN, SS:

Fritz D. Babbert, being duly sworn, says that he is Vice President and Secretary of Byrum Lithographing Co., Inc., and Graphic Realty, Inc. and is Executive Vice President and Secretary of ByChrome Co., and that the following is a list of the stockholders of said three corporations and the number of shares held by each of such stockholders, on the dates indicated, as shown by the records of said corporations:

BYRUM LITHOGRAPHING CO., INC.

Stockholder	December 9, 1958 Class A *	December 9, 1958 Class B *	September 5, 1964 Class A	September 5, 1964 Class B
Jack Babbert	14	70	16	80
Albert R. Brose	25	125	33	165
M. C. Byrum	22	935	5	850
Carey & Co.	165	—	165	—
John H. Graessle	8	40	—	—
Milton J. Crites	2	10	4	20
Fritz D. Babbert	4	20	6	30
Eddie H. O'Neill	2	10	2	10
Glenn K. Starkey	6	30	6	30
C. Ray Bradley	2	10	—	—
Ruth A. Schleich	—	—	2	10
Aquilla Flewellen, Jr.	—	—	1	5

* Both classes have voting power of one vote for each share.

BYCHROME CO.

Stockholder	December 9, 1958 Common	September 5, 1964 Class A *	Class B *
M. C. Byrum	22	—	287
Marian A. Byrum	2	—	21
Albert R. Brose	3	30	30
Fritz D. Babbert	1	—	—
Jack L. Babbert	3	—	—
Glenn K. Starkey	1	—	—
Carey & Co.	—	308	—
Allen Byrum	—	1	1

* Articles amended 12/14/59 to authorize two classes of common, both voting, each common shareholder receiving 10 shares of Class A and 10 shares of Class B in exchange for one share of common held.

GRAPHIC REALTY INC.

Stockholder	December 9, 1958 Common	September 5, 1964 Class A *	Class B *
M. C. Byrum	128	—	202
A. R. Brose	19	9	9
Fritz D. Babbert	6	—	—
Glenn K. Starkey	6	—	—
Milton J. Crites	4	—	—
Jack L. Babbert	10	—	—
John H. Graessle	8	—	—
Eddie H. O'Neill	3	—	—
Forrest Bonner	1	—	—
Henry Barrett	2	—	—
C. Ray Bradley	3	—	—
Marian A. Byrum	60	—	74
Carey & Co.		276	—
Allen Byrum		2	2

* Articles amended 12/14/59 to authorize a Class A and a Class B common, both voting, one of each class issued in exchange for one share of common.

Affiant says further that at all times during the period from December 9, 1958 to September 5, 1964, there were outstanding minority shareholders in each of said three

corporations who were unrelated to the decedent Milliken C. Byrum.

Further affiant saith not:

/s/ FRITZ D. BABBERT

(NOTARIZATION OMITTED)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 68-42

MARIAN A. BYRUM, Executrix, etc., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed April 16, 1970]

OPINION AND ORDER

This matter is before the Court on the motions of both the plaintiff and the defendant for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56(a) Fed. R. Civ. P. authorizes that "a party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Rule 56(b) Fed. R. Civ. P. makes essentially similar provisions with respect to a defending party. Where the pleadings and affidavits on file show that there is no genuine issue as to any material fact relating to the issues presented by the motion, a summary judgment on the motion, if appropriate, may be rendered forthwith.

On July 16, 1968, the plaintiff, Marian A. Byrum, Executrix of the estate of Milliken C. Byrum, deceased, moved this Court for summary judgment in her favor on the pleadings. A memorandum of law accompanied this motion. Then on September 13, 1968, defendant, United States of America, filed its motion for summary judgment and the memorandum in support thereof was received on October 2, 1968. Finally, on October 21, 1968 the plaintiff filed a reply memorandum.

The facts which have given rise to this lawsuit are undisputed and the vehicle of summary judgment as provided in the federal rules seems a most appropriate method of resolving the issues presented. Under a Trust Agreement

dated December 9, 1958, a certain block of common capital voting stock was transferred by the decedent during his lifetime to the Huntington National Bank as sole trustee. The agreement provided for a discretionary trust for the benefit of the settlor's children with the corpus being administered as a single trust until the youngest child reaches the age of 21 years. Prior to the youngest child reaching the age of 21 years, the distribution of income and principal was in the absolute and sole discretion of the trustee "with due regard to the individual needs for education, care, maintenance and support" of the children or any child.

The trust, by its terms, was irrevocable with the rights retained by the settlor being the power to vote the unlisted corporate stock in the trust, the power to remove the designated trustee and appoint a successor corporate trustee, and the power to veto the sale or investment of the trust corpus.

The Court is directly concerned with the interpretation to be given to a section of the Internal Revenue Code. Section 2036 of Title 26, United States Code, provides in relevant part:

> (a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact and before his death—
>
> (1) the possession or enjoyment of, or the right to the income from, the property, or
>
> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

The specific provision of the Trust Agreement which will be the focus of the present judicial inquiry is Section 5.06. It provides:

> [The Trustee shall have the power] To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that, during

> Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

The precise legal question presented to the Court for determination is whether Section 2036(a)(1) and/or (2) of the Internal Revenue Code operates to make includable in the gross estate of the decedent the unlisted corporate stock mentioned in Section 5.06 of the Trust Agreement.

The Court is not without legal precedent on this matter although there does not appear to be any prior decisions dealing with these identical set of facts. With respect to Section 2036(a)(1) of the Internal Revenue Code, the includability of the corpus of the trust in the gross estate for estate tax purposes is predicated upon three requirements: (1) there must be an inter vivos transfer by the decedent by trust or otherwise; (2) the decedent must have retained "the possession or enjoyment of or the right to income from the property"; and, (3) such retention of reservation must have been for the decedent's life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death. *Richards* v. *C.I.R.*, 375 F.2d 997 (10th Cir. 1967) and 26 U.S.C.A. § 2036(a)(1).

There is no dispute in this case with respect to (1) and (3) above, but the applicability of (2), that is, whether the decedent retained "the possession or enjoyment of or the right to income from the property," is a determination that must be made by the Court.

For the purposes of the statute which makes includable in a decedent's gross estate for federal tax purposes the value of all property of which the decedent made a transfer under which he retained for his life the possession or enjoyment thereof, the term enjoyment is not a word of art but is synonymous with substantial present economic benefit. *McNichol's Estate* v. *C.I.R.*, 265 F.2d 667 (3d Cir. 1959), *cert. denied*, 361 U.S. 829.

The Government's own regulations seem to follow a similar interpretation of this term:

> The "use, possession, right to the income, or other enjoyment of the transferred property" is considered as having been retained by or reserved to the decedent

> to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation, or otherwise for his *pecuniary benefit*. Reg. § 20.2036-1. [Emphasis added.]

Case law defining the exact scope of the term "substantial present economic benefit" is somewhat sparse, especially with reference to the fact situation that is presented in this case. The case of *Yeazel* v. *Coyle*, 2 CCH Fed. Estate & Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524 (N.D. Ill. Nov. 18, 1968), provides the Court with a relevant discussion of the matter. In *Yeazel*, the testator had transferred to herself as trustee, shares of stock in a corporation in which she was, prior to the transfer, sole shareholder. The trust instrument gave her broad authority to sell and invest the corpus without the limitation of any statute or rule of court concerning investment by trustees and she was empowered "to vote all stock held as part of the trust property." The Government contended that the trust transfer left the decedent with significant powers over this stock, including the ability to control the corporation and thus the distribution of dividends, thereby making the value of the stock includable in the gross estate under Section 2036(a)(1).

> It is apparent that the decedent retained no direct pecuniary benefit from the stock she placed in trust. All of the income was to be paid to the named beneficiaries. The corpus of the trust was irrevocably earmarked for the four beneficiaries. . . . It is true that by reason of retaining the voting rights, Mrs. Crowley remained in the position of controlling the dividend policy of the corporation and the distribution of income to the beneficiaries. Although Mrs. Crowley could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable. . . . Even without the direct payment of dividends, the beneficiaries were in a position to receive the economic benefit of the stock since they could use it as security for a loan which would provide them with cash until the end of the ten year period, at which time they would receive the

stock itself. If the Government's argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036(a), is not that broad. *Yeazel, supra,* at 8684-5.

The Court substantially agrees with the rationale of the *Yeazel* opinion. The Government seeks to distinguish *Yeazel* on the ground that the decedent there was also the trustee, thus her retained power was limited by the fiduciary obligation, enforceable in a court of equity, imposed by her position as trustee. The fact that Byrum in this case was not a trustee, however, indicates to the Court that Byrum was that much further removed from control of the economic benefits of the stock. Further, while it is true that Byrum had the power to remove the trustee and appoint a successor corporate trustee at any time (thus in reality, the Government suggests Byrum had trustee type control over the trust corpus), whatever powers exercised by any successor corporate trustee were subject to scrutiny by a court of equity, thus preventing abuse of the trustee's power in favor of Byrum and thus squaring the *Yeazel* rationale with the facts in the instant case.

Section 2036(a)(2) of the Internal Revenue Code provides that the value of the gross estate of a decedent shall include the value of all property in which the decedent has retained:

> the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom. 26 U.S.C.A. § 2036(a)(2).

The Government contends that the settlor's retention of his right to vote the unlisted stock transferred in trust together with his right to vote the stock he still owns gives him the right to designate the recipient of the income under the Trust Agreement. Reliance is placed by the Government on Revenue Ruling 67-54, 1967-1 Cumulative Bulletin 269. This ruling states:

> The value of nonvoting corporate stock transferred in trust is includible in the grantor's gross estate where

> the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where the trustee was restricted in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

The *Yeazel* court distinguished this Revenue Ruling by stating:

> My attention is also called to *Rev. Rul.* 67-54, 1967-8 Int. Rev. Bull. 10, which I am urged to regard as stating that a grantor with control over both the dividend policy of a company and the assets of the trust is able to designate who benefits from the property or income. As applied to the facts in this case, however, I cannot agree with this view of the statute since it is clear that only the four named beneficiaries can benefit from the stock. *Yeazel, supra*, at 8685.

The Court determines that Revenue Ruling 67-54 cannot operate to make includable this trust property in the decedent's estate. The decedent's power to control the trust property was not without limitation and the Court considers that sufficient control was relinquished, and sufficient checks were retained on what control was retained, to avoid the application of Section 2036 to the facts in the instant case. See, generally, *Jennings* v. *Smith*, 161 F.2d 74 (2nd Cir. 1947) and 3 J. Merten's Estate and Gift Tax § 24.30.

WHEREUPON, the Court determines that the motion of the plaintiff for summary judgment is meritorious and therefore it is GRANTED. The motion of the defendant for summary judgment is without merit and therefore it is DENIED.

Defendant is hereby ORDERED to refund the sum of

$13,202.45, together with interest at the rate of six percent ~~(6%)~~ per annum from June 28, 1967.

/s/ Joseph P. Kinneary
United States District Judge

(CAPTION OMITTED)

NOTICE OF APPEAL

(Filed June 10, 1970.)

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order granting plaintiff's motion for summary judgment and denying defendant's motion for summary judgment entered in this action on the 16th day of April, 1970.

WILLIAM W. MILLIGAN
United States Attorney

/s/ ALVIN J. McKENNA
Assistant United States Attorney

June 10, 1970

(CERTIFICATE OMITTED)

No. 20526

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARIAN A. BYRUM, Executrix under the Last Will and Testament of MILLIKEN C. BYRUM, Deceased, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Ohio

Decided and Filed April 8, 1971

Before: PHILLIPS, Chief Judge, BROOKS, Circuit Judge and O'SULLIVAN, Senior Circuit Judge.

BROOKS, Circuit Judge. This is an appeal by the United States from an adverse ruling of the District Court, 311 F. Supp. 892, on the issue of whether certain assets transferred into an irrevocable trust could be included in decedent-grantor's estate by operation of 26 U.S.C. § 2036.[1] The action arose by a claim for refund of taxes paid and

[1] Section 2036 [as amended by Section 18 (a)(2) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960].

"Transfers with retained life estate

"(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

"(1) the possession or enjoyment of, or the right to the income from, the property, or

"(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

was decided on motions for summary judgment with a stipulated set of facts. We affirm the judgment of the District Court.

That portion of the trust agreement [2] that the Govern-

---

[2] The Trust Agreement in pertinent parts provided:

"Article IV. Irrevocable Trust.

"This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

"Article V. Powers Of The Trustee.

"The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon and vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

* * * *

"Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

"Investments. 5.05 To invest any money in the Trust estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

"Voting. 5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

* * * *

"Leases. 5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases renewable forever.

* * * *

"Income Allocation. 5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

* * * *

"Limitation. 5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

"Article VI. Division At Age 21.

* * * * *

"Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay to such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

* * * *

"Article VIII. Removal of Trustee.

"If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Ohio, Trustee.

"Grantor, prior to his death, and after the death of the Grantor, the Grantors wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

"Article IX. Miscellaneous Provisions.

* * * *

"Discretion 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem ad-

ment contends made the assets transferred into trust includable in the grantor's estate under 26 U.S.C. § 2036 relates to the grantor's retained powers to: 1) vote the shares of unlisted stock in the trust corpus; 2) veto the transfer by the trustee of any of these shares of stock; and 3) to remove and appoint a successor corporate trustee at will. It should be noted that the shares of unlisted stock transferred into trust were those of a closed corporation, and the grantor's retaining of the right to vote the stock in trust combined with the stock he personally retained kept him in voting control of the corporation.

The Government's principal argument is that the powers retained by grantor made the value of the shares of stock transferred into trust includable in his estate because the grantor retained for his life "the possession or enjoyment of . . . the property . . . ." 26 U.S.C. § 2036(a)(1). The District Court properly concluded that the retaining of the power to veto the sale of these shares of stock by the trustee did not, under present interpretation of the statute, make the value of the shares transferred includable in the grantor's estate, see *Reinecke* v. *Northern Trust Company*, 278 U.S. 339 (1929); *Michigan Trust Company* v. *Kavanagh*, 284 F.2d 502 (6th Cir. 1960); *Hays' Estate* v. *Commissioner of Internal Revenue*, 181 F.2d 169 (5th Cir. 1950); *Jennings* v. *Smith*, 161 F.2d 74 (2nd Cir. 1947); *Estate of Budd*, 49 T.C. 468 (1968); *Estate of Pardee*, 49 T.C. 140 (1967); *Cf. State Street Trust Company* v. *United States*, 263 F.2d 635 (1st Cir. 1959). Nor, for that matter, did the grantor's retaining of the power to replace the trustee by another corporate trustee make the value of the shares includable. See *Estate of Budd*, *supra* and cf. Rev. Reg. 20.2036-1(b)(3) *with* n. 2 Trust Agreement, Article VIII.

The only power retained by the grantor which may possibly have made the transferred assets includable in his estate was the power to vote the unlisted shares of stock. The District Court concluded that this did not make the assets includable and we agree. Several cases have considered this aspect of retained control and have concluded that it is not

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visable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payment shall be binding on all persons.

sufficient to make the value of shares transferred in trust includable in the grantor's estate. See *Estate of Willard V. King*, 37 T.C. 973 (1962); *Yeasel* v. *Coyle*, 2 CCH Fed. Estate and Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524. The Government's attempt to distinguish these cases is without substance. In addition, the Government's reliance on *United States* v. *O'Malley*, 383 U.S. 627 (1966) and *Joy* v. *United States*, 404 F.2d 419 (6th Cir. 1968) is inappropriate under the facts of the present case. In *O'Malley* the crucial factor making the value of the transferred assets includable in the grantors estate was that the grantor retained the power to regulate or allocate the distribution of income. Similarly, in *Joy* v. *United States, supra,* it was the grantor's retained power to accumulate and distribute income which proved fatal. This was not the situation under the present trust agreement. See n. 2 Trust Agreement, Par. 5.13, 5.15, 6.02, 9.02. The Government contends that since the grantor remained in voting control of the corporation he could, by electing the Board of Directors, determine dividend policies and thus the grantor could indirectly regulate or control who enjoyed the income from the property. However, the grantor by retaining the voting right of the stock only controlled who could serve as directors of the corporation. These individual directors would then be under a fiduciary obligation to exercise sound business judgment in declaring dividends and could not act in bad faith to the injury of the beneficial owners of the stock. This obligation is governed by an ascertainable standard and is analogous to the situation which exists in cases where the grantor retains broad managerial control of a trust, see *Reinecke* v. *Northern Trust Company, supra; Jennings* v. *Smith, supra; Estate of Budd, supra,* and does not result in making these assets includable in the grantors estate.

While Revenue Ruling 67-54, 1967-1 Cum. Bull. 269, strictly construed is distinguishable from the facts in this case, it does tend to support the position advanced by the Government on this appeal. Rulings, however, do not have the force of law and are at most merely persuasive. *Lincoln Savings and Loan Association* v. *Commissioner of Internal Revenue*, 422 F.2d 90, 92 (9th Cir. 1970), U.S. App. Pndg.; 1 Mertens, Law of Federal Income Taxation, § 3.20.

Insofar as such Ruling might be applied to the facts of this case, it is in conflict with the law as interpreted by the courts and should be disregarded. *United States Truck Sales Company* v. *United States,* 229 F.2d 693, 696 (6th Cir. 1956); *First Kentucky Company* v. *Gray,* 190 F.Supp. 824, 825 (W.D.Ky., 1960), affirmed 309 F.2d 845 (6th Cir. 1962).

The judgment is affirmed.

PHILLIPS, Chief Judge. (Dissenting.) I respectfully dissent.

Mr. Byrum, the decedent, transferred to the trust some of his shares of stock in three closely-held corporations of which he was the controlling stockholder. He reserved the right to vote the shares which he transferred to the trust. He also continued to have the right to vote the shares owned by him individually which were not transferred to the trust. His right to vote the transferred shares, combined with his right to vote the shares which he held himself and did not transfer in trust, kept him in control of all three corporations throughout his lifetime.

The record ownership of shares of stock in the three corporations as of the time of Mr. Byrums death on September 5, 1964, was as follows:

Corporation	Trust	Settlor	Stock Outstanding
Byrum Lithographing	165	855	1440
Graphic Realty	276	202	574
Bychrome	308	287	678

As I interpret the trust instrument, Mr. Byrum's control of the three corporations was the same after the creation of the trust as it was before. After the transfers, as before, the settlor remained in a position to dictate the dividend policies of the corporation. He had the power to control the distribution of income to the trust. He could determine when and whether the corporation would distribute earnings as dividends and thus when and whether the trust would receive income from the stock which would be available for distribution to the beneficiaries of the trust.

In addition to reserving the right to vote the stock, he retained the power to veto any sale of the stock by the trustee and the right to remove the trustee and appoint a new trustee.

It is not determinative, in my opinion, that any one of these retained rights, standing alone in a different factual situation, might not have subjected the stock to the federal estate tax as a part of the taxable estate of the decedent. I would hold that the retained powers in the aggregate, under the facts and circumstances of this case, operated to reserve to the settlor the enjoyment of the shares and the right to designate the persons who would enjoy the income from them, within the meaning of § 2036(a)(1) and (2) of the Internal Revenue Code of 1954.

I agree with the Government's interpretation of the trust instrument: that through his control of the corporations the settlor retained the power to determine whether the beneficiaries of the trust would receive income from the shares during his lifetime. When the trust instrument is thus construed, the settlor possessed the right to designate the persons who would enjoy the income from the shares within the meaning of § 2036(a)(2). *U. S.* v. *O'Malley,* 383 U.S. 627; *Joy* v. *U. S.,* 404 F.2d 419 (6th Cir.).

Since Mr. Byrum guaranteed to himself the right to control the corporations for his lifetime through rights retained under the trust instrument, the retained rights were of substantial present economic benefit to him. He was assured a position as a salaried officer of the corporations for as long as he desired. He could increase his salary or fringe benefits. He could control all corporate decisions affecting him financially. I would hold that he retained for his life the enjoyment of the transferred stock within the intendment of § 2036(a)(1). See *Commissioner* v. *Estate of Church,* 335 U.S. 632, 644-46.

I further disagree with the majority opinion with respect to Revenue Ruling 67-54, 1967-1 Cum. Bull. 269. A copy of this ruling is made an appendix to this dissenting opinion. I consider this ruling to be a correct interpretation of the statute.

I would reverse.

Appendix

Rev. Rul. 67-54, 1967-1 Cum. Bull. 269:

The value of nonvoting corporate common stock transferred in trust is includible in the grantors gross estate for Federal estate tax purposes, where the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where (1) the grantor was himself a trustee of the trust at his death, or (2) the trustee was restricted

> in any way in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantors death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

Advice has been requested whether the value of nonvoting corporate common stock transferred in trust is includible in the deceased grantor's gross estate for Federal estate tax purposes where he had the power to regulate, for his life or for a period which did not in fact end before his death, the potential income from the transferred property through his retention of the corporation's voting stock, in cases where (1) as trustee he could control the disposition of the transferred property during his lifetime, or (2) the trustee was restricted in any way in his power to dispose of the transferred property, and the trustee held the transferred property at the grantor's death.

The decedent transferred assets to a corporation which issued nonvoting preferred stock and debentures, which he retained, for the full current value of the assets transferred. The corporation also issued 10 shares of voting and 990 shares of non-voting common stock. The decedent transferred the 990 shares of nonvoting stock in trust for the benefit of his children. The trust owned the 990 shares at the date of the decedents' death. The trustee was required to get the permission of the grantor before disposing of the transferred stock. By retaining the 10 shares of voting stock, which he still owned at the time of his death, the decedent had complete control of the company and was in a position to determine its dividend policy in respect of the nonvoting shares. By the restriction upon the trustee, the decedent had control over the disposition of the nonvoting stock.

[The following portion of Rev. Rul. 67-54 was not included in the appendix to Judge Phillips' dissenting opinion but is included here for the convenience of the Court.]

Section 2036(a) of the Internal Revenue Code of 1954 provides:

> General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any

time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 20.2036-1(b)(3) of the Estate Tax Regulations provides:

The phrase "right * * * to designate the person or persons who shall possess or enjoy the transferred property or the income therefrom" includes a reserved power to designate the person or persons to receive the income from the transferred property, or to possess or enjoy nonincome-producing property, during the decedent's life or during any other period described in paragraph (a) of this section. With respect to such a power, it is immaterial (i) whether the power was exercisable alone or only in conjunction with another person or persons, whether or not having an adverse interest; (ii) in what capacity the power was exercisable by the decedent or by another person or persons in conjunction with the decedent; and (iii) whether the exercise of the power was subject to a contingency beyond the decedent's control which did not occur before his death (e.g., the death of another person during the decedent's lifetime).

Where a decedent transfers nonvoting stock in trust and holds for the remainder of his life voting stock giving him control over the dividend policy of the corporation, he has retained, for a period which did not in fact end before his death, the right to determine the income from the nonvoting stock. If he also retains control over the disposition of the nonvoting stock, whether as trustee, by restriction upon the trustee, or alone or in conjunction with another, he has in fact made a transfer whereby he has retained for his life the right to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Since under section 20.2036-1(b)(3) of the Estate Tax Regulations it is immaterial in what capacity a power was exercisable by the decedent, it is sufficient that the power was exercisable in the capacity of controlling stockholder. Under the facts of this case, therefore, the decedent has made a transfer with a reserved power within the meaning of section 2036(a) of the Code.

Section 20.2031-2(f)(2) of the regulations provides, in part, that in determining the fair market value of shares of stock where actual prices and bona fide bid and asked

prices are lacking, one of the relevant factors to be considered is the degree of control of the business represented by the block of stock to be valued. Where the block consists of the voting common stock of a corporation, a substantial portion of the entire value of the common stock is to be attributed to that block, and hence the per share value of the voting stock should be relatively larger than the per share value of the nonvoting stock.

Accordingly, it is held that the value of nonvoting corporate stock transferred to a trust is includible in the gross estate of a deceased grantor for Federal estate tax purposes under section 2036 of the Code where the grantor owned the voting stock for the remainder of his life and was therefore able to control the income from the transferred property, and where the trustee was restricted in his power to dispose of the transferred property and held it at the grantor's death. The grantor thereby retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Under section 2031 of the Code, the value of the nonvoting shares included in the gross estate should reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20,526

MARIAN A. BYRUM, Executrix under the Last Will and Testament of MILLIKEN C. BYRUM, Deceased,
PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[Filed April 8, 1971]

BEFORE: PHILLIPS, Chief Judge, BROOKS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge
Appeal from the United States District Court for the Southern District of Ohio

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court

/s/ Carl W. Reuss
Clerk

Issued as Mandate:

COSTS: NONE

SUPREME COURT OF THE UNITED STATES

No. 71-308

UNITED STATES,

Petitioner,

v.

MARIAN A. BYRUM, *Executrix Under the Last Will and Testament of Milliken C. Byrum*

ORDER ALLOWING CERTIORARI. Filed November 9, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

☆ U.S. Government Printing Office: 1971—451-639/353

No.

AUG 30

E. ROBERT SEAVER

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF MILLIKEN C. BYRUM, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ERWIN N. GRISWOLD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion and order of the district court (Appendix A, *infra*, pp. 13-20) are reported at 311 F. Supp. 892. The majority opinion of the court of appeals and the dissenting opinion of Chief Judge Phil-

lips (Appendix B, *infra*, pp. 21-31) are reported at 440 F. 2d 949.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1971 (Appendix C, *infra*, pp. 33-34). By order dated June 28, 1971, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including September 4, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The decedent transferred to an irrevocable trust stock in three corporations which he controlled, and he retained, for his lifetime, the right to vote the transferred stock and voting control of the corporations, and also reserved the power to prevent the trustee from selling or otherwise disposing of the stock.

The question presented is whether the value of the stock transferred is includable ~~in the~~ decedent's gross estate because, within the meaning of Section 2036(a) of the Internal Revenue Code of 1954, he retained for his lifetime the right to designate the persons who would enjoy the income from the stock or the right to continued enjoyment of the stock.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

* * * *

STATEMENT

Decedent owned 71 percent, 83 percent and 88 percent, respectively, of the stock of three closely-held corporations whose stock was at no time listed on any stock exchange. In 1958, he created an irrevocable trust for the benefit of his children and, from time to time thereafter, transferred shares in the three corporations to the trust. Under the trust terms, decedent retained for his lifetime the power to vote all unlisted stocks and the power to prevent the trustee

from selling or otherwise disposing of any trust assets. He thus had the same control over the corporations after the transfers as he had had previously, and was assured of that control for his lifetime.[1] (Appendix B, *infra*, pp. 22-25, 28-29.)

The trust instrument gave the corporate trustee power to distribute trust income and principal to the beneficiaries in its discretion. Until decedent's youngest child reached age 21, the trust was to be administered as a single unit, with no duty to equalize distributions among the children. Thereafter, separate trusts were to be established for each living child and for the surviving issue of any deceased child. Each child's separate trust was to terminate when that child reached age 35. (Appendix A, *infra*, p. 14; R. 28-30.)[2]

Section 2036(a) of the Internal Revenue Code of 1954 requires the inclusion in the gross estate of a decedent of the value of any property he has transferred by *inter vivos* gift, if he retained for his lifetime "(1) the * * * enjoyment of * * * the property" transferred; or "(2) the right, either alone or in con-

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[1] The record ownership of shares of stock in the three corporations following the last of decedent's transfers was as follows (Appendix B, *infra*, p. 28):

Corporation	Trust	Settlor	Stock Outstanding
Byrum Lithographing	165	855	1,440
Graphic Realty	276	202	574
Bychrome	308	287	678

[2] The "R." reference is to the record appendix filed in the court of appeals, a copy of which we have lodged with the Clerk of this Court. The trust instrument is there reprinted in its entirety.

junction with any person, to designate the persons who shall * * * enjoy * * * the income therefrom." Following decedent's death on September 5, 1964, the Commissioner determined that the transferred stock was includable in his gross estate under Section 2036 (a)(2), because, by reason of his retained power to control corporate dividend policy, he had the right to regulate the flow of income to the trust, and thereby to postpone the beneficial enjoyment of the income from the stock until after his death. The Commissioner also determined that the shares were includable under Section 2036(a)(1), because, by reason of his retained power of voting control over each corporation, he had the right to continue to benefit economically from the transferred shares for his lifetime.

In the refund action which followed, on cross motions for summary judgment, the district court granted respondent's motion (Appendix A, *infra*, pp. 13-20).[3] The government appealed, and the court of appeals affirmed, Chief Judge Phillips dissenting (Appendix B, *infra*, pp. 28-31). He would have held the transferred stock includable under both subsections of Section 2036(a).

REASONS FOR GRANTING THE WRIT

1. The decision below opens a substantial loophole in the estate tax law. It provides a solution to one of the most common and persistent estate planning

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[3] The jurisdiction of the district court rested on 28 U.S.C. 1346(a).

problems faced by majority owners of closely held corporate stock—how to maintain control of their corporations throughout their lifetimes, and yet pass on their businesses at death without paying estate taxes. Both of these goals can be readily accomplished by use of the device approved by the Sixth Circuit majority here.

If permitted to stand even temporarily, the decision below will invite widespread utilization of the estate plan sanctioned, both within the Sixth Circuit, and elsewhere, where this precedent offers the promise of tax benefits previously thought to be unavailable. See Rev. Rul. 67-54, 1967-1 Cum. Bull. 269. Majority corporate owners who insist on retaining lifetime control of their corporations will not hesitate to rely on the court of appeals' holding, for they have little to lose, and much to gain, by doing so. The impact of the decision, both in terms of the number of taxpayers affected and the revenues involved, is substantial, and warrants review by this Court.

Moreover, prompt review of the question presented also is desirable from the standpoint of sound administration of the estate tax laws. A failure now to resolve this question definitively will result in a multiplicity of administrative proceedings, and then in extensive litigation, because, short of a decision by this Court, the Internal Revenue Service cannot accept a rule which strikes so directly at the integrity of the estate tax provisions. As in the case of the somewhat related problem involving reciprocal trusts (see *United States* v. *Estate of Grace*, 395 U.S. 316,

where this Court granted the government's petition for certiorari), a surge of litigation can be avoided only through review by this Court.

2. The principles underlying Section 2036 and related provisions of the estate tax law (Sections 2037 and 2038), all of which are derived from Section 811 of the 1939 Code, have been forged by this Court in a series of decisions spanning the last three decades. The holding below, in both its aspects, conflicts in principle with these decisions, and is erroneous.

a. It is settled that a grantor's retained power either to distribute or to accumulate trust income constitutes a power to "designate" within the meaning of Section 2036(a)(2) (see *United States* v. *O'Malley*, 383 U.S. 627, 631; see also *Commissioner* v. *Estate of Holmes*, 326 U.S. 480, 487; *Lober* v. *United States*, 346 U.S. 335), since a grantor who retains the power to accumulate may, by exercising it, deny the current beneficiaries the privilege of immediate enjoyment, and condition their eventual enjoyment upon surviving the grantor. See *United States* v. *O'Malley*, *supra* at 631. As the Court said in the *O'Malley* case, a contrary conclusion would do violence to "the legislative policy of subjecting to tax all property which has been the subject of an incomplete *inter vivos* transfer."

Decedent's transfers here were likewise incomplete. Of the bundle of rights which inhered in his ownership of the shares, he retained important elements which gave him continuing voting control of the corporations. Thus he had effective power to determine all aspects of corporate policy, including corporate

dividend policy. Unless he approved the payment of dividends, no income could pass to the current beneficiaries of the trust during his lifetime. The conclusion of the majority below that this did not constitute the power to "designate" within the meaning of *O'Malley* ignores the long established principle that substance and reality, rather than form, are to govern in the application of Sections 2036-2038 and their predecessor provisions. See *Helvering* v. *Hallock*, 309 U.S. 106, 114, 116-118; *Commissioner* v. *Estate of Church*, 335 U.S 632, 643-646; see also *United States* v. *Estate of Graee*, 395 U.S. 316, 321.

Contrary to the majority view in the court of appeals (Appendix B, *infra*, p. 27), it is not material that decedent's control over dividend policy may have been exercised through the boards of directors of the corporations, rather than by him individually. Section 2036(a)(2) is not confined to situations in which the grantor alone has the power to accumulate income. It applies whether his power is exercisable "alone *or in conjunction with any person.*" (Emphasis added.) Indeed, in the *O'Malley* case itself, the grantor was one of three trustees (383 U.S. at 629).[4]

[4] *Estate of King* v. *Commissioner*, 37 T.C. 973, upon which the majority below relied (Appendix B, *infra*, p. 26), is not in point. The Tax Court there specifically found as a fact (37 T.C. at 974) that the securities in question "were at no time significant from the point of view of control of the particular companies involved." *Yeazel* v. *Coyle*, 68-1 U.S. T.C. par. 12,524 (N.D. Ill.), also cited below (Appendix B, *infra*, p. 26), is contrary to our position. In that case, however, unlike this one, the district court acknowledged that the grantor, as controlling stockholder, could have prevented the payment of a dividend and thereby regulated the

Nor is it significant, as the majority thought (Appendix B, *infra*, p. 27), that the directors of a corporation have "a fiduciary obligation to exercise sound business judgment in declaring dividends, and could not act in bad faith to the injury of the beneficial owners of the stock." This obligation is no more governed by an "ascertainable standard" (*ibid.*) than the similar obligation of a trustee who is expressly empowered in his sole discretion to distribute or accumulate trust income. The discretion invested in corporate directors either to declare dividends or to reinvest earnings in the business, like the trustee's discretionary power to accumulate, is so broad as to preclude judicial oversight save in cases of clear abuse. The fiduciary obligation does not, therefore, provide a limitation on the power to designate sufficiently definite to remove the case from the reach of Section 2036(a)(2). Wherever the dividing line may ultimately be drawn between ascertainable and non-ascertainable standards for purposes of that provision, the former category surely cannot include a limitation, such as that involved here, which leaves

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flow of income to the trust. Having done so, it inexplicably concluded, despite this Court's opinion in *O'Malley, supra*, that—

> [a]lthough * * * [the settlor] could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable * * *.

Moreover, the district court went on to hold that the stock was includable in the decedent's gross estate under Section 2035, thus making its Section 2036 discussion mere dictum and precluding the government from taking an appeal.

the grantor largely free to choose between two entirely appropriate alternatives, one of which may have the effect of postponing the beneficial enjoyment of the income until after his death.

b. By retaining voting control of the corporations and the right to veto any sale of corporate stock, decedent also retained the "enjoyment of * * * the property" within the meaning of Section 2036(a)(1). This Court has repeatedly held that the terms " 'enjoyment' and 'enjoy,' as used in * * * [Sections 2036, 2037 and 2038 and their predecessors], are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." *Commissioner* v. *Estate of Holmes, supra* at 486. See *Helvering* v. *Hallock, supra* at 114, 117-119; *Commissioner* v. *Estate of Church, supra* at 645; *Lober* v. *United States, supra* at 637; *United States* v. *Estate of Grace, supra* at 320.

For all practical purposes with respect to the control of the corporations, decedent was in the same position after the transfers as he was previously. He retained the right to a position with the corporations as an officer, free from the possibility of discharge by the directors or other shareholders; he retained the right, within broad limitations, to receive compensation for his services in the form of salary, retirement and fringe benefits, which he could fix himself, within wide limits; he retained the right to determine whether and when the corporations would be liquidated or merged into other corporations; and he retained the right to determine how long these benefits would continue through his veto power over the disposition of trust assets. These are the critical

rights associated with the controlling stock interest in a close corporation (see 1 O'Neal, *Close Corporations*, Sec. 1.07 (1971 ed.)), and thus constitute a "substantial present economic benefit" as that term has been used by this Court.

To be sure, decedent did not retain all of his enjoyment of the transferred property. The trustee was given the right to receive such dividends as were declared by the board of directors controlled by decedent, to receive liquidation distributions if decedent, as controlling stockholder, voted to liquidate one or more of the corporations, and to receive the proceeds of the sale of some or all of the stock if decedent authorized the sale. But it is not necessary for the application of Section 2036(a)(1) that all rights to enjoyment be retained. This was settled in 1949 when the Court clearly declared in *Commissioner* v. *Estate of Church, supra* at 645, that a settlor could avoid tax under the "enjoyment" provisions only by a transfer in which he "absolutely, unequivocally, irrevocably, and without possible reservation, parts with * * * *all of his enjoyment of the transferred property*. After such a transfer has been made, the settlor must be left with * * * *no right* * * * *to enjoy the property* then or thereafter." (Emphasis added.)

The rule stated in *Church* remains good law. The Court reaffirmed it only two years ago in *United States* v. *Estate of Grace, supra*, in explaining (395 U.S. at 320) that "[t]he general purpose of the statute [the predecessor of Section 2036(a)] was to include in a decedent's gross estate transfers that are essentially testamentary—*i.e.*, transfers which leave

the transferor a *significant* interest in or control over the property transferred during his lifetime." (Emphasis added.) The decision below cannot be squared with this purpose.[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED B. UGAST,
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AUGUST 1971.

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[5] The majority below cited *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (Appendix B, *infra*, pp. 26, 27), for the proposition that the grantor's retention of broad managerial powers over a trust, including the right to veto sales of trust assets, does not require inclusion of the trust property in his gross estate. Insofar as the issues in that case may have turned on managerial powers, it is enough to point out that it arose prior to the enactment in 1924 of the predecessor of the present Section 2038 (see *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89-90), and under the statute in force prior to the decision in *May* v. *Heiner*, 281 U.S. 238, which was thereafter completely recast by Congress into the predecessor of the present Section 2036 (see *Commissioner* v. *Estate of Church*, *supra* at 639-640). At all events, the general proposition concerning managerial powers has no bearing where, as here, the veto power, coupled with retained voting control of the corporations in question, enabled the grantor to regulate the flow of income to the beneficiaries, and to continue to enjoy much of the economic power represented by the stock transferred in trust.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 68-42

MARIAN A. BYRUM, Executrix, etc., PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed April 16, 1970]

OPINION AND ORDER

This matter is before the Court on the motions of both the plaintiff and the defendant for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56(a) Fed. R. Civ. P. authorizes that "a party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." Rule 56(b) Fed. R. Civ. P. makes essentially similar provisions with respect to a defending party. Where the pleadings and affidavits on file show that there is no genuine issue as to any material fact relating to the issues presented by the motion, a summary judgment on the motion, if appropriate, may be rendered forthwith.

On July 16, 1968, the plaintiff, Marian A. Byrum, Executrix of the estate of Milliken C. Byrum, deceased, moved this Court for summary judgment in her favor on the pleadings. A memorandum of law

accompanied this motion. Then on September 13, 1968, defendant, United States of America, filed its motion for summary judgment and the memorandum in support thereof was received on October 2, 1968. Finally, on October 21, 1968 the plaintiff filed a reply memorandum.

The facts which have given rise to this lawsuit are undisputed and the vehicle of summary judgment as provided in the federal rules seems a most appropriate method of resolving the issues presented. Under a Trust Agreement dated December 9, 1958, a certain block of common capital voting stock was transferred by the decedent during his lifetime to the Huntington National Bank as sole trustee. The agreement provided for a discretionary trust for the benefit of the settlor's children with the corpus being administered as a single trust until the youngest child reaches the age of 21 years. Prior to the youngest child reaching the age of 21 years, the distribution of income and principal was in the absolute and sole discretion of the trustee "with due regard to the individual needs for education, care, maintenance and support" of the children or any child. . . .

The trust, by its terms, was irrevocable with the rights retained by the settlor being the power to vote the unlisted corporate stock in the trust, the power to remove the designated trustee and appoint a successor corporate trustee, and the power to veto the sale or investment of the trust corpus.

The Court is directly concerned with the interpretation to be given to a section of the Internal Revenue Code. Section 2036 of Title 26, United States Code, provides in relevant part:

> (a) General rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the dece-

dent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact and before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

The specific provision of the Trust Agreement which will be the focus of the present judicial inquiry is Section 5.06. It provides:

> [The Trustee shall have the power] To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that, during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

The precise legal question presented to the Court for determination is whether Section 2036(a)(1) and/or (2) of the Internal Revenue Code operates to make includable in the gross estate of the decedent the unlisted corporate stock mentioned in Section 5.06 of the Trust Agreement.

The Court is not without legal precedent on this matter although there does not appear to be any prior decisions dealing with these identical set of facts. With respect to Section 2036(a)(1) of the Internal Revenue Code, the includability of the corpus of the trust in the gross estate for estate tax purposes is predicated upon three requirements: (1) there must be an inter vivos transfer by the decedent by trust or otherwise; (2) the decedent must have retained "the possession or enjoyment of or the right to income from the property"; and, (3) such retention of reservation must have been for the decedent's life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death. *Richards* v. *C.I.R.*, 375 F.2d 997 (10th Cir. 1967) and 26 U.S.C.A. § 2036 (a)(1).

There is no dispute in this case with respect to (1) and (3) above, but the applicability of (2), that is, whether the decedent retained "the possession or enjoyment of or the right to income from the property," is a determination that must be made by the Court.

For the purposes of the statute which makes includable in a decedent's gross estate for federal tax purposes the value of all property of which the decedent made a transfer under which he retained for his life the possession or enjoyment thereof, the term enjoyment is not a word of art but is synonymous with substantial present economic benefit. *McNichol's Estate* v. *C.I.R.*, 265 F.2d 667 (3d Cir. 1959), *cert. denied*, 361 U.S. 829.

The Government's own regulations seem to follow a similar interpretation of this term:

> The "use, possession, right to the income, or other enjoyment of the transferred property" is

> considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation, or otherwise for his *pecuniary benefit*. Reg. § 20.2036-1. [Emphasis added.]

Case law defining the exact scope of the term "substantial present economic benefit" is somewhat sparse, especially with reference to the fact situation that is presented in this case. The case of *Yeazel* v. *Coyle*, 2 CCH Fed. Estate & Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524 (N.D. Ill. Nov. 18, 1968), provides the Court with a relevant discussion of the matter. In *Yeazel*, the testator had transferred to herself as trustee, shares of stock in a corporation in which she was, prior to the transfer, sole shareholder. The trust instrument gave her broad authority to sell and invest the corpus without the limitation of any statute or rule of court concerning investment by trustees and she was empowered "to vote all stock held as part of the trust property." The Government contended that the trust transfer left the decedent with significant powers over this stock, including the ability to control the corporation and thus the distribution of dividends, thereby making the value of the stock includable in the gross estate under Section 2036(a)(1).

> It is apparent that the decedent retained no direct pecuniary benefit from the stock she placed in trust. All of the income was to be paid to the named beneficiaries. The corpus of the trust was irrevocably earmarked for the four beneficiaries. . . . It is true that by reason of retaining the voting rights, Mrs. Crowley remained in the position of controlling the dividend policy

> of the corporation and the distribution of income to the beneficiaries. Although Mrs. Crowley could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable. . . . Even without the direct payment of dividends, the beneficiaries were in a position to receive the economic benefit of the stock since they could use it as security for a loan which would provide them with cash until the end of the ten year period, at which time they would receive the stock itself. If the Government's argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036(a) is not that broad. *Yeazel, supra,* at 8684-5.

The Court substantially agrees with the rationale of the *Yeazel* opinion. The Government seeks to distinguish *Yeazel* on the ground that the decedent there was also the trustee, thus her retained power was limited by the fiduciary obligation, enforceable in a court of equity, imposed by her position as trustee. The fact that Byrum in this case was not a trustee, however, indicates to the Court that Byrum was that much further removed from control of the economic benefits of the stock. Further, while it is true that Byrum had the power to remove the trustee and appoint a successor corporate trustee at any time (thus in reality, the Government suggests Byrum had trustee type control over the trust corpus), whatever

powers exercised by any successor corporate trustee were subject to scrutiny by a court of equity, thus preventing abuse of the trustee's power in favor of Byrum and thus squaring the *Yeazel* rationale with the facts in the instant case.

Section 2036(a)(2) of the Internal Revenue Code provides that the value of the gross estate of a decedent shall include the value of all property in which the decedent has retained:

> the right, either alone or in conjunction with any person, to designate the person who shall possess or enjoy the property or the income therefrom. 26 U.S.C.A. § 2036(a)(2).

The Government contends that the settlor's retention of his right to vote the unlisted stock transferred in trust together with his right to vote the stock he still owns gives him the right to designate the recipient of the income under the Trust Agreement. Reliance is placed by the Government on Revenue Ruling 67-54, 1967-1 Cumulative Bulletin 269. This ruling states:

> The value of nonvoting corporate stock transferred in trust is includible in the grantor's gross estate where the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where the trustee was restricted in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should

> reflect the additional value inherent in the closely held voting shares by reason of control of the company policies.

The *Yeazel* court distinguished this Revenue Ruling by stating:

> My attention is also called to *Rev. Rul.* 67-54, 1967-8 Int. Rev. Bull. 10, which I am urged to regard as stating that a grantor with control over both the dividend policy of a company and the assets of the trust is able to designate who benefits from the property or income. As applied to the facts in this case, however, I cannot agree with this view of the statute since it is clear that only the four named beneficiaries can benefit from the stock. *Yeazel, supra*, at 8685.

The Court determines that Revenue Ruling 67-54 cannot operate to make includable this trust property in the decedent's estate. The decedent's power to control the trust property was not without limitation and the Court considers that sufficient control was relinquished, and sufficient checks were retained on what control was retained, to avoid the application of Section 2036 to the facts in the instant case. See, generally, *Jennings* v. *Smith*, 161 F.2d 74 (2nd Cir. 1947) and 3 J. Merten's Estate and Gift Tax § 24.30.

WHEREUPON, the Court determines that the motion of the plaintiff for summary judgment is meritorious and therefore it is GRANTED. The motion of the defendant for summary judgment is without merit and therefore it is DENIED.

Defendant is hereby ORDERED to refund the sum of $13,202.45, together with interest at the rate of six percent (6%) per annum from June 28, 1967.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX B

No. 20526

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARIAN A. BYRUM, Executrix under the Last Will and Testament of MILLIKEN C. BYRUM, Deceased, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Ohio

Decided and Filed April 8, 1971

Before: PHILLIPS, Chief Judge, BROOKS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

BROOKS, Circuit Judge. This is an appeal by the United States from an adverse ruling of the District Court, 311 F. Supp. 892, on the issue of whether certain assets transferred into an irrevocable trust could be included in decedent-grantor's estate by operation of 26 U.S.C. § 2036.[1] The action arose by a

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[1] Section 2036 [as amended by Section 18 (a) (2) of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960]:

"Transfers with retained life estate

"(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a

claim for refund of taxes paid and was decided on motions for summary judgment with a stipulated set of facts. We affirm the judgment of the District Court.

That portion of the trust agreement [2] that the Gov-

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transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

"(1) the possession or enjoyment of, or the right to the income from, the property, or

"(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

[2] The Trust Agreement in pertinent parts provided:

"Article IV. Irrevocable Trust.

"This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

"Article V. Powers Of The Trustee.

"The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon and vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

* * * *

"Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said

Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

* * * *

"Investments. 5.05 To invest any money in the Trust estate in stocks, bonds, investment trusts, common trust funds and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation whatsoever as to character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

"Voting. 5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

* * * *

"Leases. 5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases renewable forever.

* * * *

"Income Allocation. 5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

* * * *

"Limitation. 5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the

powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

"Article VI. Division At Age 21.

* * * *

"Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay to such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

* * * *

"Article VIII. Removal of Trustee.

"If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more different names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Ohio, Trustee.

"Grantor, prior to his death, and after the death of the Grantor, the Grantor's wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may

ernment contends made the assets transferred into trust includable in the grantor's estate under 26 U.S.C. § 2036 relates to the grantor's retained powers to: 1) vote the shares of unlisted stock in the trust corpus; 2) veto the transfer by the trustee of any of these shares of stock; and 3) to remove and appoint a successor corporate trustee at will. It should be noted that the shares of unlisted stock transferred into trust were those of a closed corporation, and the grantor's retaining of the right to vote the stock in trust combined with the stock he personally retained kept him in voting control of the corporation.

The Government's principal argument is that the powers retained by grantor made the value of the shares of stock transferred into trust includable in his estate because the grantor retained for his life "the possession or enjoyment of . . . the property . . . ." 26 U.S.C. § 2036(a)(1). The District Court properly concluded that the retaining of the power to veto the sale of these shares of stock by the trustee

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thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

"Article IX. Miscellaneous Provisions.

* * * *

"Discretion 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate as it shall deem advisable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payment shall be binding on all persons.

did not, under present interpretation of the statute, make the value of the shares transferred includable in the grantor's estate, see *Reinecke* v. *Northern Trust Company*, 278 U.S. 339 (1929); *Michigan Trust Company* v. *Kavanagh*, 284 F.2d 502 (6th Cir. 1960); *Hays' Estate* v. *Commissioner of Internal Revenue*, 181 F.2d 169 (5th Cir. 1950); *Jennings* v. *Smith*, 161 F.2d 74 (2nd Cir. 1947); *Estate of Budd*, 49 T.C. 468 (1968); *Estate of Pardee*, 49 T.C. 140 (1967); *Cf. State Street Trust Company* v. *United States*, 263 F.2d 635 (1st Cir. 1959). Nor, for that matter, did the grantor's retaining of the power to replace the trustee by another corporate trustee make the value of the shares includable. See *Estate of Budd, supra* and cf. Rev. Reg. 20.2036-1(b)(3) *with* n. 2 Trust Agreement, Article VIII.

The only power retained by the grantor which may possibly have made the transferred assets includable in his estate was the power to vote the unlisted shares of stock. The District Court concluded that this did not make the assets includable and we agree. Several cases have considered this aspect of retained control and have concluded that it is not sufficient to make the value of shares transferred in trust includable in the grantor's estate. See *Estate of Willard V. King*, 37 T.C. 973 (1962); *Yeasel* v. *Coyle*, 2 CCH Fed. Estate and Gift Tax Rep. (68-1 U.S. Tax Cas.) ¶ 12,524. The Government's attempt to distinguish these cases is without substance. In addition, the Government's reliance on *United States* v. *O'Malley*, 383 U.S. 627 (1966) and *Joy* v. *United States*, 404 F.2d 419 (6th Cir. 1968) is inappropriate under the facts of the present case. In *O'Malley* the crucial factor making the value of the transferred assets includable in the grantor's estate was that the grantor retained the power to regulate or allocate

the distribution of income. Similarly, in *Joy* v. *United States, supra*, it was the grantor's retained power to accumulate and distribute income which proved fatal. This was not the situation under the present trust agreement. See n. 2 Trust Agreement, Par. 5.13, 5.15, 6.02, 9.02. The Government contends that since the grantor remained in voting control of the corporation he could, by electing the Board of Directors, determine dividend policies and thus the grantor could indirectly regulate or control who enjoyed the income from the property. However, the grantor by retaining the voting right of the stock only controlled who could serve as directors of the corporation. These individual directors would then be under a fiduciary obligation to exercise sound business judgment in declaring dividends and could not act in bad faith to the injury of the beneficial owners of the stock. This obligation is governed by an ascertainable standard and is analogous to the situation which exists in cases where the grantor retains broad managerial control of a trust, see *Reinecke* v. *Northern Trust Company, supra; Jennings* v. *Smith, supra; Estate of Budd, supra,* and does not result in making these assets includable in the grantor's estate.

While Revenue Ruling 67-54, 1967-1 Cum. Bull. 269, strictly construed is distinguishable from the facts in this case, it does tend to support the position advanced by the Government on this appeal. Rulings, however, do not have the force of law and are at most merely persuasive. *Lincoln Savings and Loan Association* v. *Commissioner of Internal Revenue*, 422 F.2d 90, 92 (9th Cir. 1970), U.S. App. Pndg.; 1 Mertens, Law of Federal Income Taxation, § 3.20. Insofar as such Ruling might be applied to the facts of this case, it is in conflict with the law as interpreted by the courts and should be disregarded.

United States Truck Sales Company v. *United States*, 229 F.2d 693, 696 (6th Cir. 1956); *First Kentucky Company* v. *Gray*, 190 F.Supp. 824, 825 (W.D.Ky., 1960), affirmed 309 F.2d 845 (6th Cir. 1962).

The judgment is affirmed.

PHILLIPS, Chief Judge. (Dissenting.) I respectfully dissent.

Mr. Byrum, the decedent, transferred to the trust some of his shares of stock in three closely-held corporations of which he was the controlling stockholder. He reserved the right to vote the shares which he transferred to the trust. He also continued to have the right to vote the shares owned by him individually which were not transferred to the trust. His right to vote the transferred shares, combined with his right to vote the shares which he held himself and did not transfer in trust, kept him in control of all three corporations throughout his lifetime.

The record ownership of shares of stock in the three corporations as of the time of Mr. Byrum's death on September 5, 1964, was as follows:

Corporation	Trust	Settlor	Stock Outstanding
Byrum Lithographing	165	855	1440
Graphic Realty	276	202	574
Bychrome	308	287	678

As I interpret the trust instrument, Mr. Byrum's control of the three corporations was the same after the creation of the trust as it was before. After the transfers, as before, the settlor remained in a position to dictate the dividend policies of the corporation. He had the power to control the distribution

of income to the trust. He could determine when and whether the corporation would distribute earnings as dividends and thus when and whether the trust would receive income from the stock which would be available for distribution to the beneficiaries of the trust.

In addition to reserving the right to vote the stock, he retained the power to veto any sale of the stock by the trustee and the right to remove the trustee and appoint a new trustee.

It is not determinative, in my opinion, that any one of these retained rights, standing alone in a different factual situation, might not have subjected the stock to the federal estate tax as a part of the taxable estate of the decedent. I would hold that the retained powers in the aggregate, under the facts and circumstances of this case, operated to reserve to the settlor the enjoyment of the shares and the right to designate the persons who would enjoy the income from them, within the meaning of § 2036(a) (1) and (2) of the Internal Revenue Code of 1954.

I agree with the Government's interpretation of the trust instrument: that through his control of the corporations the settlor retained the power to determine whether the beneficiaries of the trust would receive income from the shares during his lifetime. When the trust instrument is thus construed, the settlor possessed the right to designate the persons who would enjoy the income from the shares within the meaning of § 2036(a)(2). *U. S.* v. *O'Malley*, 383 U.S. 627; *Joy* v. *U. S.*, 404 F.2d 419 (6th Cir.).

Since Mr. Byrum guaranteed to himself the right to control the corporations for his lifetime through rights retained under the trust instrument, the retained rights were of substantial present economic benefit to him. He was assured a position as a sal-

aried officer of the corporations for as long as he desired. He could increase his salary or fringe benefits. He could control all corporate decisions affecting him financially. I would hold that he retained for his life the enjoyment of the transferred stock within the intendment of § 2036(a)(1). See *Commissioner* v. *Estate of Church*, 335 U.S. 632, 644-46.

I further disagree with the majority opinion with respect to Revenue Ruling 67-54, 1967-1 Cum. Bull. 269. A copy of this ruling is made an appendix to this dissenting opinion. I consider this ruling to be a correct interpretation of the statute.

I would reverse.

APPENDIX

Rev. Rul. 67-54, 1967-1 Cum. Bull. 269:

The value of nonvoting corporate common stock transferred in trust is includible in the grantor's gross estate for Federal estate tax purposes, where the grantor retained for the remainder of his life a controlling interest in the corporate voting stock and where (1) the grantor was himself a trustee of the trust at his death, or (2) the trustee was restricted in any way in his power to dispose of the nonvoting stock, and the trustee held the nonvoting stock at the grantor's death. Since the grantor retained the power to regulate the income from the transferred property, he retained for his life or for a period which did not in fact end before his death the right to designate the persons who shall possess or enjoy the property or the income therefrom. The value of the nonvoting shares included in the gross estate should reflect the additional value inherent in

the closely held voting shares by reason of control of the company policies.

Advice has been requested whether the value of nonvoting corporate common stock transferred in trust is includible in the deceased grantor's gross estate for Federal estate tax purposes where he had the power to regulate, for his life or for a period which did not in fact end before his death, the potential income from the transferred property through his retention of the corporation's voting stock, in cases where (1) as trustee he could control the disposition of the transferred property during his lifetime, or (2) the trustee was restricted in any way in his power to dispose of the transferred property, and the trustee held the transferred property at the grantor's death.

The decedent transferred assets to a corporation which issued nonvoting preferred stock and debentures, which he retained, for the full current value of the assets transferred. The corporation also issued 10 shares of voting and 990 shares of non-voting common stock. The decedent transferred the 990 shares of nonvoting stock in trust for the benefit of his children. The trust owned the 990 shares at the date of the decedent's death. The trustee was required to get the permission of the grantor before disposing of the transferred stock. By retaining the 10 shares of voting stock, which he still owned at the time of his death, the decedent had complete control of the company and was in a position to determine its dividend policy in respect of the nonvoting shares. By the restriction upon the trustee, the decedent had control over the disposition of the nonvoting stock.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 20,526

MARIAN A. BYRUM, Executrix under the Last Will and Testament of MILLIKEN C. BYRUM, Deceased,
PLAINTIFF-APPELLEE

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[Filed April 8, 1971]

BEFORE: PHILLIPS, Chief Judge, BROOKS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge

Appeal from the United States District Court for the Southern District of Ohio

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal,

as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court

/s/ Carl W. Reuss
Clerk

Issued as Mandate:

COSTS: NONE

☆ U. S. GOVERNMENT PRINTING OFFICE; 1971 441443 114

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-308

UNITED STATES OF AMERICA,
Petitioner.

v.

MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF MILLIKEN C. BYRUM, DECEASED

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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It is the position of respondent that the petition for a writ of certiorari should be denied for the reason that this case was correctly decided by the Court of Appeals, and for the further reason that it is not a case of great public concern.

QUESTION PRESENTED

Did the retention of voting rights in stock transferred by decedent during his lifetime require the inclusion of the stock in his taxable estate under Section 2036 of the Internal Revenue Code of 1954.

COUNTER-STATEMENT

The decedent, during his lifetime, created an irrevocable trust for the benefit of his children, naming a national banking corporation as trustee. The trust agreement provided that during his lifetime "all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime." (R. 25) There was included in the corpus of the trust unlisted voting stock in three corporations. The right to vote the stock transferred to the trust coupled with the vote from stock held by decedent gave him a majority vote in each of the three corporations. From the time of the creation of the trust until decedent's death, there were minority stockholders in each of the corporations. (R. 46, 47 and 48).

The corpus of the trust included other assets in addition to the unlisted stock. (R. 35-45).

No distributions of income or principal were made by the corporate trustee during decedent's lifetime. (R. 35).

REASONS FOR DENIAL OF WRIT

1. Contrary to the tenor of the petition for a writ of certiorari, this is not a case of the applicability of the federal estate tax law to a new tax avoidance device. It represents, instead, a bid by the Internal Revenue Service to tax a kind of *inter vivos* transfer heretofore considered, in the Sixth Circuit at least, to be excluded from the federal estate tax. The transfer allows the making of a gift of stock in a small business corporation without threat to the business well-being of the corporation.

Despite, however, this rather broad classification of the transfer involved, it is unlikely that the decision of the Court of Appeals will extend beyond the particular

facts of this case. The combination of circumstances present in this case gives the decision a considerably narrower effect than is contended for by petitioner. There is no indication that this question has arisen in other circuits or reason to believe that it will arise. And it should be apparent that the "surge of litiation"[1] which is seen as a result of this decision could be largely eliminated by petitioner's acceptance of the well reasoned decision of the Court of Appeals as precedent.

2. Admittedly, the cases hold that a grantor's retained power either to distribute or to accumulate trust income constitutes a power to "designate" within the meaning of Section 2036 (a) (2). But this is not *Byrum*. The power to accumulate or distribute income from the Byrum trust belonged to the corporate trustee alone.

Nor is there force to the argument that the decedent's majority vote gave him the power to control the dividend policies of the corporations which, in turn, gave him the power to regulate the flow of dividend income to the trust which, in turn, gave him the power, indirectly, to distribute or accumulate the income from the trust. The existence of minority stock interests precluded decedent from regulating, through his voting majority, the income to the trust by manipulating the payment of dividends to serve his personal interests. Under Ohio law he, and the directors of the corporations, stood in a position of trust as to the minority stockholders. *Selama-Dindings Plantations, Ltd.* v. *Durham*, 216 F. Supp. 104 (S. D. Ohio W.D. 1963) aff'd 337 F. 2d 949; *State* v. *Witmore*, 126 Ohio St. 381, 185 N.E. 547 (1923); *Thomas* v. *Matthews*, 94 Ohio St. 32, 113 N.E. 669 (1916).

The comparison by petitioner of the discretion of corporate directors (elected by majority voting interests) either to declare dividends or to reinvest earnings in the

1. This consequence is predicted at page 7 of the petition for a writ of certiorari.

business with the power of a trustee in his sole discretion to accumulate or distribute income is not valid. The discretion of corporate directors is measured as against the right of stockholders to dividends,[2] while the discretion of the trustee to distribute or accumulate is by the terms of the grant unfettered.

In addition, under the peculiar facts of this case, there were other income producing assets in the Byrum trust from which the corporate trustee could have paid income had it determined, in its sole discretion, to distribute income.

3. Undoubtedly, the most valuable property attribute of stocks is their income. *Commissioner* v. *Estate of Church*, 335 U.S. 632, 644 (1949). Both the income from and the legal title to the stocks in question were irrevocably transferred by the decedent during his lifetime. The retained power to vote the stock did not give to decedent a substantial present economic benefit in the property transferred requiring its inclusion in decedent's estate under Section 2036 (a) (1). Cf. *Lober* v. *United States*, 346 U.S. 335 (1953); *Commissioner* v. *Estate of Holmes*, 326 U.S. 480 (1948).

The "right to control" argument is not persuasive. Assuming, *arguendo*, that petitioner correctly portrays the potential for corporate control existing through the vote of this stock,[3] it is apparent that the economic benefit to be had by decedent therefrom, was, at most, an indirect pecuniary benefit, coming not so much from the property

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2. *Wilberding* v. *Miller*, 90 Ohio St. 28, 42 (1914); *Arbuckle* v. *Woolson Spice Co.*, 21 O.C.C. 356 (1901).

3. Section 1701.56, Revised Code of Ohio, requires that there be not less than three directors, who stand in a fiduciary relationship to the corporation and to minority stockholders. *Selama-Dindings Plantations, Ltd.* v. *Durham*, 216 F. Supp. 104 (S. D. Ohio W.D. 1963) aff'd 337 F2d 949; *State* v. *Witmore*, 126 Ohio St. 381, 391, 185 N.E. 547 (1923); *Thomas* v. *Matthews*, 94 Ohio St. 32, 43, 113 N.E. 669 (1916). Section 1701.69, Revised Code of Ohio, provides that directors shall fix the compensation of officers, unless otherwise stated in the articles, and Section 1701.33, Revised Code of Ohio, gives directors alone the right to declare dividends.

transferred as from his ability to take advantage of the leverage offered by his voting rights.

To this same basic argument, the Court said in *Yeazel* v. *Coyle*, 68-1 U.S.T.C. ¶12,524:

> "As pointed out by the Supreme Court in Commissioner v. Estate of Holmes, [46-1 USTC ¶10,245], 326 U.S. 480, 486 (1946), the words 'enjoyment' and 'enjoy', as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit'. The Government's own regulations follow the same reasoning:
>
> 'The 'use, possession, right to the income, or other enjoyment of the transferred property' is considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.'
>
> Reg. §20.2036-1.
>
> "It is apparent that the decedent retained no direct pecuniary benefit from the stock she placed in the trust.
>
> * * *
>
> "The Government further argues that Mrs. Crawley retained an indirect economic or pecuniary benefit in the stock by reason of her combined role as individual shareholder and trustee, thereby giving her possession and enjoyment within the meaning of Section 2036 (a) (1).
>
> * * *
>
> "If the Government's argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036 (a) is not that broad."

It is submitted that the right to vote the stock under the facts of the Byrum case did not constitute retention

of "the possession or enjoyment of, or the right to the income from, the property," transferred within the meaning of Section 2036 (a) (1).

CONCLUSION

The decision of the Court of Appeals is narrowly drawn to fit the unusual facts of this case. There is no evidence of differing views in the circuits and it is unlikely that the question decided will be a recurring one.

Petitioner fails to show that this is a case of great public concern and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILE COPY

No. 71-308

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion and order of the district court (R. 33–39)[1] are reported at 311 F. Supp 892. The majority opinion of the court of appeals and the dissenting opinion of Chief Judge Phillips (R. 41–50) are reported at 440 F. 2d 949.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1971 (R. 51). By order dated June 28, 1971, Mr. Justice Stewart extended the time for filing

[1] "R." references are to the separately bound record appendix.

a petition for a writ of certiorari to and including September 4, 1971. The petition was filed on August 30, 1971, and certiorari was granted on November 9, 1971 (R. 52). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The decedent transferred to an irrevocable trust stock in three corporations which he controlled, and he retained, for his lifetime, the right to vote the transferred stock and voting control of the corporations, and also reserved the power to prevent the trustee from selling or otherwise disposing of the stock.

The question presented is whether the value of the stock transferred is includible in the decedent's gross estate because, within the meaning of Section 2036(a) of the Internal Revenue Code of 1954, he retained for his lifetime the right to designate the persons who would enjoy the income from the stock or the right to continued enjoyment of the stock.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2036 [as amended by Sec. 18(a), Revenue Act of 1962, P.L. 87-834, 76 Stat. 1052]. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's

worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

* * * * *

STATEMENT

Decedent, Milliken C. Byrum, owned controlling common stock interests in three closely held corporations whose stock was at no time listed on any stock exchange. On December 9, 1958, he created an irrevocable trust to which from time to time thereafter he transferred shares of such stock. The income beneficiaries of the trust were his children; the trust terms provided that the decedent, for his lifetime, would retain (1) the right to vote all unlisted stocks, and (2) the right to prevent the trustee from selling or otherwise disposing of any trust assets. Subject to these and other powers retained by decedent, the trustee (a bank) was given the power, until decedent's youngest child reached age 21, to distribute trust income and principal to the beneficiaries in its (R. 14) "absolute and sole discretion * * * with due regard to their individual needs for education, care, maintenance and support * * *," and with no duty to equalize distri-

butions among the children.[2] Thereafter, separate trusts were to be established for each living child and for the surviving issue of any deceased child. Each child's separate trust was to terminate when that child reached age 35. (R. 10–11, 14–15, 33–35, 42–44.)

Decedent died on September 5, 1964. At that time he and the trust (by virtue of his transfers) held common stock in the three corporations in the following proportions:

	Percentage Owned by Decedent	Percentage Owned by Trust	Total Percentage Owned by Decedent and Trust
Byrum Lithographing Co., Inc.	59	12	71
Graphic Realty, Inc.	35	48	83
Bychrome Co.	42	46	88

The transfers of stock in trust, subject to decedent's assured voting power, thus had no effect on decedent's lifetime control of the corporations. (R. 44, 46.)

Section 2036(a) of the Internal Revenue Code of 1954 (*supra*, pp. 2–3) requires the inclusion in the gross estate of a decedent of the value of any property he has transferred by *inter vivos* gift, if he retained for his lifetime "(1) the * * * enjoyment of * * * the property" transferred, or "(2) the right, either alone or in conjunction with any person, to designate the persons who shall * * * enjoy * * * the income therefrom." Following decedent's death, the Commissioner determined that the transferred stock was includible in his gross estate under Section 2036(a)(2), because, by reason of his retained power to control

[2] Decedent also reserved the rights to direct trust investments and to remove the trustee and designate another corporate trustee as successor (R. 11, 14, 16–17, 34, 44).

corporate dividend policy, he had the right to regulate the flow of income to the trust, and thereby to postpone the beneficial enjoyment of the income from the stock until after his death. The Commissioner also determined that the shares were includible under Section 2036(a)(1), because, by reason of his retained power of voting control over each corporation, he had the right to continue to benefit economically from the transferred shares for his lifetime.

In the refund action which followed, on cross motions for summary judgment, the district court granted respondent's motion (R. 33–39). The government appealed, and a divided court of appeals affirmed, Chief Judge Phillips dissenting (R. 41–50). He would have held the transferred stock includible under both subsections of Section 2036(a).

SUMMARY OF ARGUMENT

I

By retaining voting control of the corporations whose stock he transferred in trust, decedent was in a position to dictate corporate dividend policy. Through exercise of that retained power, he could increase or decrease corporate dividends (or stop them entirely), and thereby shift or defer the beneficial enjoyment of trust income. This retained power is tantamount to the power to accumulate income, which this Court has recognized constitutes the power to designate the persons who shall enjoy income from transferred property under Section 2036(a)(2). See *United States v. O'Malley*, 383 U. S. 627, 631.

The court of appeals' majority erred in concluding that decedent had power only to elect directors, but not to control dividend policy. As this Court has pointed out, a controlling stockholder in a close corporation can change the composition of his corporation's board virtually at will, and thereby assure that the directors vote in accordance with his wishes. See *Commissioner* v. *Sunnen*, 333 U.S. 591, 608.

Nor was the majority below correct in its holding that decedent's power to shift the beneficial enjoyment of the income was significantly limited by the fiduciary obligation imposed upon directors to act reasonably and in good faith in determining dividend policy. The directors' discretion in this regard is broad, and only narrow restrictions are imposed upon the exercise of that discretion. Except in extreme circumstances, therefore, the directors would be free to choose between two entirely appropriate alternatives—paying dividends and not paying dividends—and their decision would be final. Any limitation on decedent's power to determine dividend policy thus falls far short of establishing the kind of "ascertainable standard" which has been held to place a grantor's power to shift enjoyment beyond his own control.

A grantor who retains, as trustee, only the power to manage trust property is not in a position to regulate the flow of income to trust beneficiaries. Although he has substantial discretion with regard to investment policy, he also has a duty (assuming the trust instrument does not grant him additional powers) to

treat current beneficiaries and remaindermen impartially. Decedent, on the other hand, had no such duty, and through his retained power over corporate dividend policy, coupled with his veto power over sales of the stock in question, could regulate the flow of income to the trust. The court of appeals incorrectly held that decedent's power was no different in substance from a grantor-trustee's power merely to manage trust property.

II

By retaining voting control of the corporations, and by assuring himself of that control for his lifetime by reserving the right to veto any sale of corporate stock, decedent retained the most important economic benefits incident to the controlling stock interest in a close corporation. These included the rights to continued employment with the corporations and to set his own salary and other remuneration. It matters not that the retention of any one power by decedent would not have caused the value of the transferred stock to be included in his gross estate. In determining whether decedent retained the "enjoyment" of that stock within the meaning of Section 2036(a)(1), the various powers retained are to be considered in the aggregate and in the light of the fact that decedent remained the controlling stockholder. It likewise is of no moment that decedent did not retain every benefit associated with the stock interest transferred. The retention of any substantial economic benefits is sufficient under the decisions of

this Court to invoke the enjoyment provision of Section 2036(a)(1). See, *e.g., Commissioner* v. *Estate of Church,* 335 U.S. 632, 645.

ARGUMENT

INTRODUCTION

The purpose and method of the federal estate tax are to lay a tax upon the passage of property at death. Accordingly, in the ordinary case, the value of the property held by the decedent at his death is the subject of the tax. But to effectuate this basic policy, it was long ago found necessary [3] to include in the decedent's gross estate for federal estate tax purposes property which was the subject of a gratuitous, incomplete transfer made during his lifetime. In general, Congress has required that in order to escape the estate tax, an *inter vivos* transfer must be absolute—the decedent may retain no substantial rights in the transferred property. See Sections 2036–2040 of the Internal Revenue Code of 1954. And this is particularly true with respect to the "enjoyment" provisions of Sections 2036, 2037 and 2038, all of which are derived from Section 811 of the 1939 Code, and have been treated extensively by this Court.

Section 2036(a) deals with transferred property subject to the grantor's retained power (1) to continue to enjoy the transferred property, or (2) either

---

[3] Cf. the reference of Cardozo, J., as long ago as 1933, to "the Government's endeavors to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." *Burnet* v. *Wells*, 289 U.S. 670, 676.

alone, or in conjunction with any person, to designate the persons who shall enjoy the income therefrom. The contested issue in this case is whether decedent's transfer in trust of stock in corporations over which he exercised voting control effectively removed that stock from his gross estate, when he retained the power to vote the stock for his lifetime, and the power to prevent the trustee from selling the stock. Our position is that principles established by this Court in a series of decisions spanning the last three decades compel the conclusion that the value of the stock is includible in the decedent's gross estate under both Section 2036(a)(1) and Section 2036(a)(2). Of course, reversal of the judgment below would be required if the Court accepts either of our arguments.

I. DECEDENT'S RETENTION FOR HIS LIFETIME OF EFFECTIVE CONTROL OVER CORPORATE DIVIDEND POLICY GAVE HIM THE POWER TO "DESIGNATE" THE PERSONS WHO WOULD ENJOY THE INCOME FROM THE TRANSFERRED STOCK WITHIN THE MEANING OF SECTION 2036(a)(2)

A. DECEDENT HAD THE POWER TO SHIFT THE BENEFICIAL ENJOYMENT OF THE INCOME FROM THE TRANSFERRED STOCK

A grantor who transfers property in trust, and who retains for his lifetime the power either to distribute or accumulate trust income may, by exercising the latter power, deny current trust beneficiaries the privilege of immediate enjoyment of the income, and condition their eventual enjoyment upon surviving the grantor. Such a power therefore constitutes a power to "designate" who shall enjoy the income from the trans-

ferred property within the meaning of Section 2036 (a)(2), and its retention by a grantor requires inclusion of the value of the transferred property in his gross estate. See *United States* v. *O'Malley*, 383 U.S. U.S. 627, 631.[4] As this Court explained in the *O'Malley* case, only this conclusion comports with "the legislative policy of subjecting to tax all property which has been the subject of an incomplete *inter vivos* transfer."

Decedent's transfers here were no more complete than those involved in *O'Malley*. Of the bundle of rights which inhered in his ownership of the shares, he retained important elements which gave him continuing voting control of the corporations. He thus was assured for his lifetime of effective power to determine all aspects of corporate policy, including corporate dividend policy. Because decedent retained this power, no income from the transferred stock could become available for distribution by the trustee during decedent's lifetime unless decedent first approved the payment of dividends to the trustee.

The majority below held nevertheless that decedent's retained power fell short of the power to "designate", as that term was construed in *O'Malley*. It reasoned (R. 45) that decedent did not retain the

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[4] See also *Commissioner* v. *Estate of Holmes*, 326 U.S. 480, 487; *Lober* v. *United States*, 346 U.S. 335; *Joy* v. *United States*, 404 F. 2d 419 (C.A. 6); *Ritter* v. *United States*, 297 F. Supp. 1259 (S.D. W. Va.); *Estate of Rott* v. *United States*, 321 F. Supp. 654 (E.D. Mo.).

right to control dividend policy, but "only controlled who could serve as directors of the corporation. These individual directors", the majority continued, "would then be under a fiduciary obligation to exercise sound business judgment in declaring dividends and could not act in bad faith to the injury of the beneficial owners of the stock." The majority concluded that "[t]his obligation is governed by an ascertainable standard and is analogous to the situation that exists in cases where the grantor retains broad managerial control of a trust * * * [citations omitted] and does not result in making these assets includable in the grantor's estate." [5]

---

[5] *Estate of King* v. *Commissioner*, 37 T.C. 973, upon which the majority below relied (R. 45), is not in point. The Tax Court there specifically found as a fact (37 T.C. at 974) that the securities in question "were at no time significant from the point of view of control of the particular companies involved." *Yeazel* v. *Coyle*, 68-1 U.S.T.C., par. 12,524 (N.D. Ill.), also cited below (R. 45), is contrary to our position. In that case, however, unlike this one, the district court acknowledged that the grantor, as controlling stockholder, could have prevented the payment of a dividend and thereby regulated the flow of income to the trust. Having done so, it inexplicably concluded, despite this Court's opinion in *O'Malley*, *supra*, that—

> [a]lthough * * * [the settlor] could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable * * *.

This observation misses the point that it is the power to grant or withhold immediate enjoyment that is critical in cases of this character. See *Lober* v. *United States*, 346 U.S. 335, 337.

B. THE FACT THAT DECEDENT'S POWER WAS EXERCISABLE THROUGH THE BOARDS OF DIRECTORS DOES NOT RENDER SECTION 2036(a)(2) INAPPLICABLE

1. Decedent had effective control over corporate dividend policy

The analysis of the majority below is erroneous in its failure to acknowledge the obvious power of a controlling stockholder to determine corporate policy. This Court, on the other hand, recognized the practical significance of such power nearly a quarter-century ago in *Commissioner* v. *Sunnen,* 333 U.S. 591,[6] and rejected the very arguments which respondent pressed successfully in the court of appeals.

The taxpayer in *Sunnen* was an 89 percent stockholder, a director, and the president of a corporation. He gave the corporation nonexclusive manufacturing licenses under patents which he owned individually, in return for its agreement to pay him royalties. The corporation was not bound to manufacture any minimum number of the patented articles, and either party could cancel the contract without liability upon giving the required notice. The taxpayer assigned his interest in the royalty agreements to his wife, and she reported the royalties as her own income. The Commissioner determined that the royalties constituted income to the taxpayer because, as controlling

[6] See also *Morgan* v. *Commissioner*, 42 T.C. 1080, 1087, affirmed *per curiam*, 353 F. 2d 209 (C.A. 4), certiorari denied, 384 U.S. 918; cf. *Reeves' Estate* v. *Commissioner*, 8 T.C.M. 131, affirmed, 180 F. 2d 829 (C.A. 2), certiorari denied, 340 U.S. 813; O'Neal & Derwin, *Expulsion or Oppression of Business Associates*, pp. 6, 46–47 (1st ed., 1961).

stockholder, he retained a substantial interest in the royalty contracts, and had the power to fix the amount of royalties that would be paid to his wife and the time when the royalties would be paid.

The taxpayer argued in response that the corporation's right to cancel without liability could not be attributed to him, since he was only one of five directors, and a majority vote was necessary for director action. To this the Court replied, in language which we believe to be directly applicable to the case at bar, that (333 U.S. at 608) the corporation's power to cancel "gave the taxpayer, in his dominant position in the corporation, power to procure the cancellation of the contracts in their entirety. That power was nonetheless substantial because the taxpayer had but one of the three directors' votes necessary to sanction such action by the corporation. Should a majority of the directors prove unamenable to his desires, the frustration would last no longer than the date of the next annual election of directors by the stockholders, an election which the taxpayer could control by reason of his extensive stock holdings."

Here, as in *Sunnen*, the controlling stockholder was in a position to dictate corporate policy to the board. And it is no answer to say that *Sunnen*, an income tax case, is inapposite to the situation at hand. For present purposes, *Sunnen* is squarely in point, for this Court has consistently held that substance and reality, rather than form, are to govern in the application of Section 2036, of the related provisions of Sections 2037 and 2038, and of their predecessors under

prior law. See *Helvering* v. *Hallock,* 309 U.S. 106, 114, 116–118; *Commissioner* v. *Estate of Church,* 335 U.S. 632, 643–646; see also *United States* v. *Estate of Grace,* 395 U.S. 316, 321. The notion that decedent was without power to determine whether and when dividends would be paid blinks reality.

It is likewise no defense to the application of Section 2036(a)(2) that decedent's control over dividend policy was exercisable through the boards of directors of the corporations, rather than by him individually. That provision is not confined to situations in which the grantor alone has the power to designate. It applies, by its terms, whether his power is exercisable "alone or in conjunction with any person." Indeed, in the *O'Malley* case itself, the grantor was one of three trustees (383 U.S. at 629).

2. The directors' fiduciary obligation to act reasonably and in good faith in determining dividend policy did not significantly limit decedent's power to shift beneficial enjoyment

The taxpayer in *Sunnen* also argued that since he owed a fiduciary duty to the corporation, he could not cancel the contracts if that would amount to a fraud on the corporation. The Court first pointed out (333 U.S. at 609) that there might be valid business reasons for cancellation that would not constitute fraud. "All that we are concerned with here", the Court explained, "is the power to procure cancellation, not with the possibility that such power might be abused."

The same reasoning is applicable in the instant case. There are, to be sure, extreme circumstances that could be imagined in which the decedent's decisions with re-

spect to dividend policy could constitute an abuse of discretion. But, except in extreme situations, the directors' determination with respect to the payment or nonpayment of dividends could not be questioned. The directors' fiduciary obligation with regard to dividend policy requires only that they act honestly and reasonably (Bogert, *Trusts and Trustees,* § 841 (2d ed., 1962)); when accumulated earnings are reinvested in the business or are retained for any number of other valid reasons, the judgment of the directors ordinarily will be regarded by the courts as conclusive (11 Fletcher, *Cyclopedia Corporations,* § 5325 (Perm. ed., 1971)).

The vice, then, of decedent's retention of power to control dividend policy is not that that power might be abused. Rather, it is, as it was in *Sunnen,* that the power would be exercised, fully consistently with the directors' fiduciary obligation, in favor of the nonpayment of dividends, with the inevitable consequence that beneficial enjoyment of the income would be postponed until after decedent's death. See *Rollins* v. *Helvering,* 92 F. 2d 390, 395 (C.A. 8), certiorari denied, 302 U.S. 763.

Under these circumstances, there is no basis for the holding below that the fiduciary duty imposed on corporate directors with respect to the declaration of dividends creates an ascertainable standard which a court of equity would apply to compel the directors to declare or refrain from declaring dividends. On the contrary, as we have seen, the discretion invested in directors regarding dividend policy is such that a

court of equity would intervene only upon a showing of unreasonableness or bad faith. The fiduciary obligation did not, therefore, provide a significant limitation on decedent's power to shift the beneficial enjoyment of the income. Cf. *Ithaca Trust Co.* v. *United States,* 279 U.S. 151; *Old Colony Trust Co.* v. *United States,* 423 F. 2d 601, 604 (C.A. 1). After the transfers here in question, as before, decedent was largely free to determine whether all, some, or none of the corporations' earnings would be distributed as dividends or retained in the businesses.[7]

Contrary to the apparent understanding of the majority below, it is not enough to establish an ascertainable standard that a court of equity would intervene upon a showing of a fiduciary's unreasonableness or

[7] The instant case was decided in the district court on cross motions for summary judgment. The record does not indicate the state in which any of the corporations in question were incorporated. However, respondent represented below and in her brief in opposition (pp. 3-4) that Ohio law is applicable. Under the circumstances of this case, we believe the state of incorporation to be of no consequence, since it is universally recognized that a director owes a fiduciary duty to his corporation and to those interested in it. See *Pepper* v. *Litton,* 308 U.S. 295, 306; *Superintendent of Insurance* v. *Bankers Life and Casualty Co.,* No. 70-60, this Term, decided November 8, 1971. The Ohio cases cited by respondent (Br. in Opp. 3-4) stand only for the conceded proposition that directors must not act in bad faith with respect to shareholders. None of them suggests any objective test which could form the basis for an ascertainable standard. Indeed, in *Wilberding* v. *Miller,* 90 Ohio St. 28, 42, upon which respondent relies, the court observed that it "ought not to and would not intervene to control or change" a corporation's dividend policy "[i]n the absence of bad faith or an unreasonable exercise of * * * discretion." See also *Schuckman* v. *Rubenstein,* 164 F. 2d 952, 957 (C.A. 6).

bad faith. Were the rule otherwise, then any grant of discretion to a trustee would, in and of itself, serve to create such a standard. For, as the Second Circuit explained in *Stix* v. *Commissioner*, 152 F. 2d 562, 563, "no language [of a trust instrument granting discretion to a trustee], however strong, will entirely remove any power held in trust from the reach of a court of equity. After allowance has been made for every possible factor which could rationally enter into the trustee's decision, if it appears that he has utterly disregarded the interests of the beneficiary, the court will intervene. Indeed, were that not true, the power would not be held in trust at all; the language would be no more than a precatory admonition."

To be distinguished from the instant case are cases like *Jennings* v. *Smith*, 161 F. 2d 74 (C.A. 2), upon which the majority below relied (R. 44, 45). The trustees there, of whom the grantor was one, had the power in their absolute discretion to distribute corpus if a beneficiary suffered prolonged illness or extraordinary financial misfortune, and to distribute current income if necessary to maintain a beneficiary's station in life. The Second Circuit held (161 F. 2d at 77) that "the trust instrument provided an external standard which a court of equity would apply to compel compliance by the trustees on the happening of the specified contingency or to restrain threatened action if the condition were not fulfilled." It concluded, therefore (*id.* at 78), that the conditions imposed on the exercise of the grantor's right to shift the enjoyment of the trust property and income "effectively put that

'right' beyond his own control." This Court's opinion in *Sunnen* forecloses a similar conclusion in the instant case.[8]

Sunnen's teaching is relevant here in still another respect. The Court found in that case (333 U.S. at 609) that "[t]he taxpayer's controlling position in the corporation also permitted him to regulate the amount of royalties payable to his wife." Since the contracts neither provided for minimum royalties, nor required the corporation to manufacture a minimum number of the patented articles, the taxpayer could, by controlling production and sales, increase or decrease the royalties, or eliminate them entirely by halting production. Decedent here had the same power to regulate the amount of dividends that would be paid to the trust through his control over corporate decisions generally and over dividend policy.

The majority of the court of appeals thought that decedent was in a position analogous to that of a grantor who had retained broad managerial powers over a trust, and cited *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, for the proposition that the grantor's retention of such powers, including the right to veto sales of trust assets, does not require inclusion

[8] In *United States* v. *Gates*, 376 F. 2d 65, the Tenth Circuit assumed that so long as the directors of a corporation did not violate their fiduciary duty in exercising their discretion with regard to dividend policy, they could not shift the beneficial enjoyment of the income from the corporation's stock. This assumption is erroneous, and is directly inconsistent with this Court's reasoning in *Sunnen*. At all events, *Gates* is distinguishable because the trustees in that case had the power to dispose of the stock, and presumably would have done so if the current return proved unsatisfactory.

of the trust property in his gross estate (R. 45). Insofar as the issue in that case may have turned on managerial powers, it is enough to point out that it arose prior to the enactment in 1924 of the predecessor of the present Section 2038 (see *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89-90), and under the statute in force prior to the decision in *May* v. *Heiner*, 281 U.S. 238, which was thereafter completely recast by Congress into the predecessor of the present Section 2036 (see *Commissioner* v. *Estate of Church*, 335 U.S. 632, 639-640).

Moreover, the general proposition concerning managerial powers has no bearing where, as here, decedent's retained powers enabled him to regulate the flow of income to the trust.[9] This is not a case in which the grantor was required as trustee to treat the current beneficiaries and remaindermen of the trust impartially. He was not trustee, and the general rule requiring impartiality (see III Scott on *Trusts*, §236.11 (3d ed., 1967)) therefore has no application. In short, there is no analogy to the typical situation

[9] *Beckwith* v. *Commissioner*, 55 T.C. 242, acquiescence, 1971-9 Int. Rev. Bull. 6, is not inconsistent with our position in this case. The grantor in *Beckwith* received proxies annually, and voted the stock he had transferred in trust, but he had no *retained* right to vote the controlling stock interest or to keep the trustees from selling the stock. In fact, it may be inferred from the opinion in *Beckwith* that the Tax Court would decide a case like the instant one in the government's favor. Among the authorities cited with approval by the court below (R. 44) in connection with its discussion of decedent's retained veto power was *Hays' Estate* v. *Commissioner*, 181 F. 2d 169 (C.A. 5). This Court, however, disapproved of the Fifth Circuit's decision in *Hays' Estate* in *Lober* v. *United States*, 346 U.S. 335, 336.

in which a trustee's broad powers to manage trust assets are subject to the restraint that he act in such a manner as to protect current beneficiaries as well as remaindermen. Decedent owed a fiduciary obligation only as a director, and, as we have shown, that obligation did not establish an objective limitation on his power to designate. Indeed, in the proper exercise of his discretion as a director, decedent may well have determined not to declare dividends even if the current beneficiaries were in need of additional income. And, with his absolute power to veto sales of trust assets, he could have prevented the trustee from selling the stock and reinvesting the proceeds in securities that would produce a greater current return.[10]

In sum, here as in *Sunnen* (333 U.S. at 608), decedent's retention of powers "may properly be said to have left him with something more than a memory." The corporation-trust device employed here provided two levels of discretion with regard to current distributions of income, and through the exercise of decedent's nearly absolute discretion at the first level, the trustee's discretion to distribute or accumulate income was dependent in the first instance upon the will and judgment of decedent. To hold in these circumstances

[10] Respondent points to the fact (Br. in Opp. 4) that the trustee, "in [its] sole discretion," could have distributed income from other income-producing trust assets. This fact is irrelevant to the issue before this Court. The Commissioner at no time has contended that the value of other trust assets is includible in decedent's gross estate, but has limited his contentions to the stock in question, because, with respect to it, decedent, as well as the trustee, had the power to designate.

that decedent's retention of powers does not require inclusion of the stock in his gross estate would flout the purpose of Section 2036(a)(2) to prevent transfers akin to testamentary dispositions from escaping taxation. Cf. Rev. Rul. 67-54, 1967-1 Cum. Bull. 269.

II. DECEDENT'S RETAINED VOTING CONTROL AND CONSEQUENT POWER TO DETERMINE ALL ASPECTS OF CORPORATE POLICY AFFORDED HIM THE RIGHT TO CONTINUED LIFETIME "ENJOYMENT" OF THE TRANSFERRED STOCK WITHIN THE MEANING OF SECTION 2036(a)(1)

A. DECEDENT'S VARIOUS RETAINED POWERS ARE TO BE CONSIDERED TOGETHER, NOT INDIVIDUALLY, IN DETERMINING WHETHER HE RETAINED THE RIGHT TO ENJOY THE TRANSFERRED STOCK

The purpose of Section 2036(a)(1), like that of Section 2036(a)(2), is to subject to the estate tax all gratuitous transfers which have the effect of testamentary dispositions. The former provision accordingly requires inclusion in the gross estate of property transferred in trust if the grantor retains for his lifetime the right to enjoyment of the property transferred. Consistently with the statutory purpose, which underlies Sections 2037 and 2038, as well as Section 2036, this Court has repeatedly held that the terms "enjoyment" and "enjoy" as used in those provisions and in their predecessors, "are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." *Commissioner* v. *Estate of Holmes*, 326 U.S 480, 486. See *Helvering* v. *Hallock*, 309 U.S. 106, 114, 117-119; *Commissioner* v. *Estate of Church*, 335 U.S. 632, 645; *Lober* v. *United States*, 346 U.S. 335, 337; *United States* v. *Estate of Grace*, 395 U.S. 316, 320. The

statute thus applies not only where the rights or control over the property transferred is expressly reserved in the trust instrument, but also where the rights or control is retained as an incident to the transfer. Cf. *McNichol's Estate* v. *Commissioner*, 265 F. 2d 667 (C.A. 3), certiorari denied, 361 U.S. 829.

The Court's holdings require that, in determining whether decedent retained the enjoyment of the transferred stock, his retained powers to vote that stock and to veto any sales thereof be considered together, rather than in isolation from one another. These holdings also require that the significance of the retained powers with respect to the transferred stock be evaluated with due recognition of the fact of decedent's substantial stock holdings apart from the trust.

That was the approach taken by the Board of Tax Appeals and the Tax Court almost thirty years ago in *Estate of Holland* v. *Commissioner*, 47 B.T.A. 807, supplemental opinion, 1 T.C. 564. In that case, the decedent's retained voting control and power to prevent the transferee from selling the stock were deemed "on an inclusive view of the whole arrangement" (47 B.T.A. at 814; 1 T.C. at 565) to require the value of the stock to be included in her gross estate. While the decedent there retained an income interest as well, the supplemental opinion indicates that this factor was not necessary to support the decision. In contrast with the approach of the Board and the Tax Court, the majority of the court of appeals viewed each of decedent's retained powers in isolation from the other, and failed to appreciate the signifi-

cance of decedent's holdings of stock outside of the trust.

B. DECEDENT RETAINED THE MOST IMPORTANT BENEFITS ASSOCIATED WITH A CONTROLLING STOCK INTEREST IN A CLOSE CORPORATION

It is neither the mere retention of the right to vote the transferred stock, nor the veto power alone upon which the Commissioner relies to require inclusion of the stock in decedent's gross estate. Where a grantor's holdings of corporate stock (including transferred stock) represent only an unimportant minority interest, and are not significant from the standpoint of voting control, the reservation of either of such rights might well not require inclusion of the transferred shares under Section 2036(a)(1). But where the cumulative effect of the retained powers and the rights flowing from the shares not placed in trust leaves the grantor in control of a close corporation, and assures that control for his lifetime, he has retained the "enjoyment" of the transferred stock. This is vividly illustrated by the instant case, since, in several critical respects, decedent was in essentially the same position after the transfers as he had been previously. He had in fact retained those elements of the property interest which were important to him.

He retained the right to an executive position with the corporations, free from the possibility of discharge; he retained the right, within broad limitations, to fix his compensation and to receive liberal retirement and fringe benefits; he retained the right

to determine whether and when the corporations would be liquidated or merged into other corporations; and he retained the right to determine how long he would continue to enjoy these benefits through his veto power over the disposition of trust assets. These are the most important benefits associated with the controlling stock interest in a close corporation (see 1 O'Neal, *Close Corporations,* § 107 (1971 ed.); *McDaniel* v. *Painter,* 418 F. 2d 545, 548 (C.A. 10)), and thus constitute a "substantial present economic benefit" as that term has been used by this Court.[11]

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[11] In O'Neal, *supra*, the author describes the benefits of a controlling stock interest in a close corporation as follows:

> Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and cares nothing for the responsibilities of management, the shareholder in a close corporation is a co-owner of the business and wants the privileges and powers that go with ownership. His participation in that particular corporation is often his principal or sole source of income. As a matter of fact, providing employment for himself may have been the principal reason why he participated in organizing the corporation. He may or may not anticipate an ultimate profit from the sale of his interest, but he normally draws very little from the corporation as dividends. In his capacity as an officer or employee of the corporation, he looks to his salary for the principal return on his capital investment, because earnings of a close corporation, as is well known, are distributed in major part in salaries, bonuses and retirement benefits.
>
> Since a shareholder's principal income may depend on retention of a position in the company and since his business and social prestige may depend in part on the retention of a major officership, naturally he is anxious to assure himself permanent employment by the corporation (preferably as one of the major officers), free from the possibility of discharge by the directors or other share-

It is true that decedent did not retain all of his enjoyment of the transferred property. The trustee was given the right to receive such dividends as were declared by the boards of directors controlled by decedent, to receive liquidation distributions if decedent, as controlling stockholder, voted to liquidate one or more of the corporations, and to receive the proceeds of the sale of some or all of the stock if decedent authorized the sale. But it is not necessary for the application of Section 2036(a)(1) that all rights to enjoyment be retained. This was settled in 1949 when the Court declared in *Commissioner* v. *Estate of Church*, *supra* at 645, that a settlor could avoid tax under the "enjoyment" provisions only by a transfer in which he "absolutely, unequivocally, irrevocably, and without possible reservations, parts with * * * *all of his enjoyment of the transferred property*. After such a transfer has been made, the settlor must be left with * * * *no right* * * * *to enjoy the property* then or thereafter."[12] (Emphasis added.)

holders. In a publicly held corporation, power to control the corporation is relatively unimportant to the shareholder-investor; in a close corporation, the power to control corporate activities or at least to veto changes in directors, officers and employees and in the methods of operating the business may be vital to the shareholder-owner. * * *

[12] Respondent cites the *Church* case (Br. in Opp. 4) for the proposition that "[u]ndoubtedly, the most valuable property attribute of stocks is their income." The Court's statement in *Church* with reference to the corporate stocks there in question was (335 U.S. at 644) that "[p]robably their greatest property value to Church was his continuing right to get their income." That statement must of course be read in the context of the facts in *Church*, but, in any event, does not support the broad

More recently, in *United States* v. *Estate of Grace*, *supra* at 320, the Court reaffirmed its statement in *Church*, explaining that the purpose of the predecessor of Section 2036(a) "was to include in a decedent's gross estate transfers that are essentially testamentary—*i.e.*, transfers which leave the transferor a significant interest in or control over the property transferred during his lifetime." See also *McNichol's Estate* v. *Commissioner*, *supra*; *Guynn* v. *United States*, 437 F. 2d 1148 (C.A. 4). The decision below cannot be squared with this purpose.

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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DECEMBER 1971.

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assertion respondent makes. Still less does it bear meaningfully on the facts here, since the total dividends on the transferred stock from December, 1958, when the trust was created, until decedent's death in September, 1964, amounted to $303.50 (R. 25–26).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-308

UNITED STATES OF AMERICA,
Petitioner,

v.

MARIAN A. BYRUM, Executrix Under the Last Will and Testament of MILLIKEN C. BYRUM, Deceased,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF HOWARD GILMAN, CHARLES GILMAN, JR. AND SYLVIA P. GILMAN, EXECUTORS OF THE WILL OF CHARLES GILMAN, DECEASED, AS *AMICI CURIAE*

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January 21, 1972

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This brief in support of Respondent's position is submitted with the written consent of counsel to both parties filed with the Clerk of the Court.

Interest of the *Amici Curiae*

The *amici curiae* are the executors of the will of Charles Gilman (the "Decedent"), a New York resident who died in 1967. The Commissioner of Internal Revenue (the "Commissioner"), has proposed a deficiency of several million

dollars in the estate tax liability of the Decedent's estate by including in the gross estate the alleged value of the assets of an *inter vivos* trust (the "Trust") created by the Decedent in 1948. The Executors having protested the proposed deficiency, the Commissioner is preparing to issue a statutory notice of deficiency. The Executors intend, upon receipt of the notice, to petition the United States Tax Court for review of the deficiency.

The relevant facts with respect to the Trust as of the time of the Decedent's death may be briefly summarized. The Decedent had no beneficial interest in the Trust; his two adult sons were to receive the income for life and, upon the death of the survivor of them, the remainder was distributable to their issue. The Trust was irrevocable; moreover, it fixed beyond amendment the disposition of its income and corpus and the time of its termination. The Trustees (the Decedent and two other individuals) could act by majority vote. They were authorized to sell any assets of the Trust and to reinvest the proceeds, without being confined to investments of the kind prescribed by law. The Trust assets consisted of six shares of common stock of Gilman Paper Company (the "Company"), a New Hampshire corporation, which were the only outstanding shares of that class and the only voting shares. The Company also had outstanding 5,262 shares of nonvoting participating preferred stock, of which 5,000 were owned by the Decedent. The Decedent was President and one of the three directors of the Company.

The Commissioner asserts that the stock of the Company held by the Trust is includible in the Decedent's gross estate solely because the Decedent, as one of the three Trustees, could participate in the voting of that stock.

Summary of Argument

Reserved managerial and administrative powers over property transferred in trust during life, including power to vote trusteed stock, do not subject the transferred property to estate tax. That rule is established by 28 decisions of this Court and the lower courts spanning a period of over 40 years; no court holds to the contrary. These decisions uniformly distinguish managerial and administrative powers over transferred property from the power "to designate the persons who shall possess or enjoy the property or the income therefrom" embraced by section 2036(a)(2) of the Internal Revenue Code. These decisions apply irrespective of whether the deceased settlor reserved the power as trustee or in his individual capacity.

The principles of those decisions apply to the transfer by a controlling stockholder of shares of his stock in trust with reservation of power to vote the trusteed shares and to prevent their sale.

The Government's argument that estate tax liability is created by the decedent's alleged power to make the trusteed stock dividend-paying or non-dividend-paying proves too much. By the same token, all of the 28 decisions we have mentioned were wrongly decided, since each settlor could have designated who should enjoy income by arbitrarily investing in income-producing or non-income-producing stocks or other property.

The decedent's control over the corporations involved did not give him a power over enjoyment of the trusteed property or income within the meaning of section 2036(a)(2), for a controlling stockholder or a director is a fiduciary. While directors possess a range of business discretion in setting dividends, courts will intervene if dividend policy is dictated by non-corporate considerations. As a corporate fiduciary, the decedent's discretion was subject to

external standards enforceable in a court of equity, so that his powers were no greater than the managerial or administrative powers that a settlor-trustee may reserve without incurring estate taxation.

The decedent's right, exercisable through the board of directors, to maintain himself in corporate employment and to be compensated therefor was not a reservation of enjoyment of the stock transferred in trust. As the Tax Court has held, the right or opportunity to draw a reasonable salary from a corporation does not amount to retained enjoyment of transferred stock within the meaning of section 2036(a)(1) of the Internal Revenue Code. A reasonable salary is earned; its *quid pro quo* is the services rendered.

The standards of fiduciary obligation that circumscribe corporate dividend policies also circumscribe corporate salary policies. A controlling stockholder may not vote himself, or cause himself to be voted, an excessive salary. The enjoyment of a minority stock interest in a corporation is the prerogative of its owner, and may not legally be usurped by the controlling stockholder through abuse of corporate office.

The income tax decision of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), on which the Government relies, is legally inapposite to the estate tax. Decisions of this Court and the lower courts clearly establish the lack of correlation between the income and estate taxes in the field of incomplete transfers. *Sunnen* is also factually irrelevant, since the taxpayer in that case retained important controls unrelated to his status as controlling stockholder.

This case calls for application of the doctrine of *stare decisis*. The principle the Government here seeks to overturn was established in a 1929 decision of this Court, *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1929), which the Government has not satisfactorily distinguished. The

erosion of that principle sought by the Government here would open to taxation an indeterminate—perhaps broad—category of trusts long regarded as nontaxable. If the Government is discontented with the present long-established rule, it should address itself to the Congress. It should not succeed in its request to this Court for retroactive reversal in disregard of *stare decisis* at this late date.

ARGUMENT

I.

Reserved managerial or administrative powers over property transferred in trust during life, including power to vote trusteed stock, do not subject the transferred property to estate tax.

The Federal estate tax statute has, from the date of its original enactment in 1916, attempted to forestall tax avoidance by including in the measure of the gross estate certain incomplete lifetime transfers of property that are regarded as substitutes for testamentary dispositions. For 55 years interpretation of the incomplete lifetime transfer provisions has vexed the administrators and the courts. However, within the kaleidoscopic pattern of the court decisions, on one proposition there is accord: Reserved managerial or administrative powers over property transferred in trust during life, including power to vote trusteed stock, do not subject the transferred property to estate tax.

a. This rule is established by a long line of decisions of this Court and the lower courts.

The story begins with *Reinecke* v. *Northern Trust Co.,* 278 U.S. 339 (1929), in which one question was whether the assets of five *inter vivos* trusts should be included in the

gross estate of the deceased settlor, who was not a trustee, because of his reservation in his individual capacity of powers "to supervise the reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees," 278 U.S. at 344. Holding that the five trusts were not subject to estate tax, this Court said:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. . . . [T]he reserved powers do not serve to distinguish [the trusts] from any other gift *inter vivos* not subject to the tax." Id. at 346-347.

In 1931 and again in 1933 this Court adhered to the above-described holding.[1] Still later, in 1948, this Court *sua sponte* invited reargument of the question. *Commissioner* v. *Estate of Church*, 335 U.S. 632 (1949); *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701 (1949). The decedent in each of those two cases had made a lifetime transfer of property to himself and another person or persons as trustees and had conferred on the trustees broad managerial and ad-

1. (1) *McCormick* v. *Burnet*, 283 U.S. 784 (1931), a *per curiam* reversal of a decision of the Seventh Circuit that had found support for taxability of an *inter vivos* trust in the deceased settlor's reservation of power to make investment decisions. 43 F.2d at 280.
(2) *Helvering* v. *Duke*, 290 U.S. 591 (1933), a *per curiam* affirmance by an equally divided Court of a Third Circuit decision for the taxpayer, in which this Court received extensive argument from the Government that the trust was taxable because the deceased settlor had retained managerial powers as trustee.

ministrative powers; moreover, the decedent in *Church* had reserved in his individual capacity the power to control investment of the trust assets. 335 U.S. at 691-692, note 1; 736. After argument and consideration of the two cases at the October 1947 Term, this Court entered an order restoring them to the docket and requesting counsel upon reargument to discuss particularly nine questions, including the following:

> "6. Under section 811(c) [of the Internal Revenue Code of 1939, the predecessor of section 2036 of the Internal Revenue Code of 1954] is the 'possession and enjoyment' of the corpus of an *inter vivos* trust 'intended to take effect * * * at or after' the settlor's death, where he names himself as co-trustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?" Journal Supreme Court, Oct. Term, 1947, pp. 297-298; 335 U.S. at 717, note 5.[2]

In its *Church* and *Spiegel* decisions, this Court answered the above question negatively by not overruling or modifying its *Northern Trust* holding with respect to reserved managerial powers.

Understandably, therefore, every lower court that has considered the estate tax classification of managerial or administrative powers in recent years holds them not to be classifiable with the taxable powers over beneficial enjoyment described in section 2036(a)(2) of the Internal

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2. The Government responded in its brief on reargument by conceding that the *Northern Trust* case had rejected as immaterial the settlor's reserved powers of management and by stating: "While we hesitate to suggest that the *Northern Trust* case should be disapproved on this ground alone, we think that this ground, coupled with the general basic considerations discussed above [*i.e.*, that the decedent's life measured the duration of the trust and that there was a remote possibility that the property would revert to him] may appropriately call for reexamination of that case." Gov't brief on reargument, pp. 43-44.

Revenue Code. Particularly noteworthy is *Old Colony Trust Co.* v. *United States,* 423 F.2d 601 (1st Cir. 1970), in which the First Circuit expressly rejected the Government's argument that the settlor-trustee's broad administrative and management powers were a ground for estate taxation and, in doing so, expressly repudiated its much-criticized decision in *State Street Trust Co.* v. *United States,* 263 F.2d 635 (1st Cir. 1959). The First Circuit said in *Old Colony:* "We hold that no aggregation of purely administrative powers can meet the government's amorphous test of 'sufficient dominion and control' so as to be equated with ownership." 423 F.2d at 603.

Four other Circuits, a District Court and the Tax Court concur in this view: (1) The Second and Third Circuits in *per curiam* affirmances of Tax Court decisions;[3] the Sixth Circuit in the decision below; the Tenth Circuit in *United States* v. *Powell,* 307 F.2d 821 (10th Cir. 1962), in which the court said "We conclude the investment power given to the trustees [the deceased settlor and a trust company] by the trust instrument was subject to and limited by a judicially established and judicially enforceable external and ascertainable standard and, hence, was no more than a management or administrative power" (307 F.2d at 826); the District Court for the Northern District of Illinois in *Yeazel* v. *Coyle,* 68-1 U.S.T.C. ¶12,524 (N.D. Ill. 1968), involving a deceased president and sole shareholder of a corporation who had transferred approximately 60 percent of the stock to herself as trustee, retaining the remaining 40 percent; and the Tax Court in an unbroken series of 19 decisions.[4]

3. *Estate of Ford* v. *Commissioner,* 450 F.2d 878 (2d Cir. 1971), *aff'g per curiam* 53 T.C. 114 (1969); *Commissioner* v. *Wilson's Estate,* 187 F.2d 145 (3d Cir. 1951), *aff'g per curiam* 13 T.C. 869 (1949).

4. The two decisions cited in note 3, *supra,* and the following: *Estate of Ralph Budd,* 49 T.C. 468 (1968); *Estate of Marvin L. Pardee,* 49 T.C. 140 (1967); *Estate of James H. Graham,* 46 T.C. 415 (1966); *Estate of Willard V. King,* 37 T.C. 973 (1962); *Estate*

In the most fully-reasoned of the 19 Tax Court decisions, *Estate of Willard V. King,* the trust indenture made by the decedent provided that trust principal might be invested in any type of property, even though speculative, extrahazardous or unproductive, and that the trustee should exercise the rights of management and investment only in accordance with the decedent's directions. The Tax Court concluded as follows:

> "[W]e think that although the decedent, under his broad discretionary powers with respect to investment, might invest in properties producing either a high or a low return of income, such powers would have to be exercised in good faith in accordance with his fiduciary responsibility and could not be used for the purpose of attempting to favor any beneficiary or class of beneficiaries to the detriment of the other beneficiaries. It is our conclusion that the right retained by the grantor was not the right to designate the persons who should possess or enjoy the property or the income therefrom within the intendment of Section 2036(a)(2)." 37 T.C. at 980.

Analysis of the 28 decisions cited and discussed above demonstrates the breadth and vitality of the principle the Government here seeks to overthrow. The decisions are by eight courts, spanning a period of 42 years, and no court holds to the contrary. The trusts in these cases involved

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of George W. Hall, 6 T.C. 933 (1946); *Estate of William F. Hofford,* 4 T.C. 790 (1945), *modifying* 4 T.C. 542; *Estate of Henry S. Downe,* 2 T.C. 967 (1943); *Lillian M. Wheeler,* 20 B.T.A. 695 (1930); *Estate of Aline Peters Peters,* T.C. Memo 1964-67; *Estate of Pierre Jay Wurts,* T.C. Memo 1960-102; *Estate of Benjamin Paschal O'Neal,* 6 CCH T.C.M. 713 (1947); *Estate of George F. Fiske,* 5 CCH T.C.M. 42 (1946); *Estate of Bayard Dominick,* 4 CCH T.C.M. 226 (1945) (supplemental opinion), *aff'd as to other issues,* 152 F.2d 843 (2d Cir. 1946); *Estate of Maurice Markson,* 3 CCH T.C.M. 309 (1944); *Estate of Laura B. Alexander,* 2 CCH T.C.M. 1156 (1943); *Estate of B. H. Kroger,* 2 CCH T.C.M. 644 (1943), *aff'd as to other issues,* 145 F.2d 901 (6th Cir. 1944); *Estate of Herbert L. Johnston,* 2 CCH T.C.M. 299 (1943).

varied types of property, including marketable securities, real estate and stocks of closely-held corporations. In all of the 28 cases the deceased settlor had broad investment powers over the trust property. The decedent held the investment powers in 8 of the cases as sole trustee[5] and in 6 of the cases as cotrustee with another person or persons.[6] In the remaining 14 cases the decedent was not a trustee, but had reserved in his individual capacity the right to make the investment decisions for the trust.[7] In 20 of the 28 cases the decedent had the right, alone or in conjunction with another person, to vote any stocks held by the trust.[8]

We have dealt at considerable length with this uniform and massive body of decisions because of the Government's attempt to dispose of the *Northern Trust* holding with respect to managerial powers on the ground that the case antedated the 1931-32 recasting of what is now section 2036 of the Internal Revenue Code.[9] Pet. Br. 18-19. That holding has received too much post-1932 reaffirmance and support to be vulnerable to the Government's charge.

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5. *Duke, Ford, Yeazel, Pardee, Wheeler, Peters, Fiske* (there was a cotrustee, but the settlor's decisions were to prevail in the event of disagreement) and *Markson*.

6. *Spiegel, Old Colony, Powell, Budd* (as to one trust; as to the other trust the settlor reserved the power to remove and replace the trustee), *Graham* and *Hofford*.

7. *Northern Trust, McCormick, Church* (who, although a cotrustee, reserved the investment powers in his individual capacity), *Wilson, King, Hall, Downe, Wurts, O'Neal, Dominick, Alexander, Kroger, Johnston* and the case below (hereinafter *Byrum*).

8. Cases cited in notes 5 and 6, *supra*, and *Northern Trust, McCormick, Church, Byrum, King* and *Downe*.

9. The Government also says that *Northern Trust* arose before the 1924 enactment of the predecessor of the present section 2038. The Government's statement is irrelevant, since it is not relying on section 2038 in seeking reversal of the decision below. Moreover, its statement is inaccurate, since the 1924 enactment was made five years before the *Northern Trust* decision and was expressly made retroactive. Revenue Act of 1924, section 302(d) and (h).

b. The rule developed in the court decisions applies in the instant case.

The Government, while acknowledging the existence of the general rule requiring impartiality in the exercise of managerial powers by a fiduciary, argues that the rule does not apply to trusts of closely-held stock where, as here, the deceased settlor was the controlling stockholder and could prevent sale of the trusteed stock. Pet. Br. 15-16, 19-20. The Government urges that such a settlor could, being unconfined by fiduciary restraints, exercise control of dividend policy through the board of directors and thus regulate the flow of income to the trust. Pet. Br. 14-15, 19.

The Government's argument that the trust is embraced by section 2036(a)(2) because of the decedent's alleged power to make the trusteed stock dividend-paying or non-dividend-paying (Pet. Br. 15-16, 19-20) proves too much. Under that argument, the trust in each of the other 27 estate tax cases we have cited (pp. 5-10, *supra*) was taxable because the settlor could have invested, or directed the trustee to invest, the trust corpus in dividend-paying stocks or in non-dividend-paying stocks or in other income-producing or non-income producing property. The Government's analysis obviously cannot be squared with *Northern Trust* and its numerous progeny, the teaching of which clearly is that the power to vary the flow of income through managerial or administrative decisions is just not the type of power reached by section 2036(a)(2). In arguing that the rule of law developed in the cases involving individually retained investment powers over security portfolios does not control here, the Government is creating a semantic distinction without a real difference.

The Government also asserts that, the decedent not being a trustee, the general rule requiring impartiality has no application. Pet. Br. 19. However, as we have shown

(note 7, *supra,* and accompanying text), *Byrum* is one of 14 estate tax cases, including this Court's landmark *Northern Trust* case, in which the settlor of an *inter vivos* trust retained management powers in his individual capacity, including the power to direct the trust's investment policy. Each of the other 13 settlors, like the decedent, could veto sales of trust property. In all 14 cases the courts held that the decedent had not retained a tax-producing power. As the Tax Court said in *King, supra,* the creator of a trust who names another as trustee and reserves in his individual capacity the right to direct the trustee's exercise of investment and voting powers has "in effect made himself a fiduciary" and is "not at liberty to administer the trust for his own benefit or to ignore the rights of the beneficiaries." 37 T.C. at 980. Under this line of decisions, retained management powers are not made tax-producing by the fact that they are retained otherwise than in the office of trustee.

We now turn to the principal vice of the Government's argument—its assertion that controlling stockholders and directors are not confined by fiduciary obligations. Pet. Br. 14-20. As this Court said in *Pepper* v. *Litton,* 308 U. S. 295, 306 (1939), "A director is a fiduciary. . . . So is a dominant or controlling stockholder or group of stockholders. . . . Their powers are powers in trust." The same principle has been stated often, for example, in *Kullgren* v. *Navy Gas & Supply Co.,* 110 Colo. 454, 135 P. 2d 1007, 1010 (S. Ct. 1943), "The relation which directors bear to the stockholders of a corporation, and the corporation itself, as 'universally conceded . . . is a fiduciary one;' and 'The law governing the obligations of fiduciaries is applicable to them.' "

These are basic principles of corporate common law, not turning on the construction of a particular corporate

statute[10] nor dependent on the presence of public security holders. O'Neal, the leading commentator on the law of closely-held corporations, in his treatise *Close Corporations* (1958 ed.) summarizes the applicable law as follows:

> "As was said by the Court of Appeals of New York [*Kavanaugh* v. *Kavanaugh Knitting Co.,* 226 N.Y. 185, 123 N.E. 148 (1919) at pp. 151-152], whenever a number of stockholders 'constitute themselves, or are by the law constituted, the managers of corporate affairs or interests, they stand in much the same attitude toward the other or minority stockholders that the directors sustain generally toward all the stockholders, and the law requires of them the utmost good faith', and a court of equity 'will protect a minority stockholder against the acts or threatened acts of the board of directors or managing stockholders of the corporation which violate the fiduciary relation and are directly injurious to the stockholders'. And, as a federal court has said, [*Jones* v. *Missouri-Edison Elec. Co.,* 144 Fed. 765, 771 (8th Cir. 1906)], majority shareholders 'owe to the minority the duty to exercise good faith, care and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just proportion of the income and of the proceeds of the property.'"

§ 8.07, at pp. 45-46.

There is no doubt that corporate directors possess a wide range of business discretion in setting dividends and that courts are consistently and properly reluctant to sub-

10. The law of Ohio is, however, consistent: see *Selama-Dindings Plantations, Ltd.* v. *Durham,* 216 F. Supp. 104 (S. D. Ohio 1963), *aff'd,* 337 F.2d 949 (6th Cir. 1964); *State* v. *Witmore,* 126 Ohio St. 381, 185 N.E. 547 (S. Ct. 1933); *Thomas* v. *Matthews,* 94 Ohio St. 32, 113 N.E. 669 (S. Ct. 1916).

stitute their business judgment for that of the directors.[11] There is no doubt either, however, that it is business judgment only that is deferred to and that a dividend policy stemming from non-corporate considerations, for example, a desire to postpone current income in favor of trust remaindermen, lacks the business basis which can alone justify it, and provides an occasion for judicial intervention at the behest of minority shareholders. The same would be true of an excessive dividend policy motivated by the desire to prefer income beneficiaries at the expense of remaindermen.

Fletcher summarizes the rule as follows: "However, the directors are not a law unto themselves, and there is some limit to their right to husband the finances of the company and reinvest the profits, or to put them back into betterments and improvements of the company's plant. The discretion of the board of directors in this regard is not unlimited, and it must be honestly exercised for the benefit of the corporation and all its shareholders." Fletcher, *Cyclopedia Corporations* (perm. ed. 1971) § 5325 at p. 633. "The principle to be applied is that which shall secure the observance of good faith on the part of the directors. . . ." *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun 18, 16 N.Y.S. 448, 449 (S. Ct. 1st Dept. 1891), *aff'd*, 133 N.Y. 687, 31 N.E. 627 (Ct. App. 1892). "The essential test of bad faith is to determine whether the policy of the directors is dictated by their personal interests rather than the corporate welfare." *Gottfried* v. *Gottfried*, 73 N.Y.S. 2d 692, 695 (S.Ct. N.Y. Co. 1947).

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11. *Nauss* v. *Nauss Bros. Co.*, 195 App. Div. 318, 187 N.Y.S. 158 (App. Div. 1st Dept. 1921); *In re Barrows' Will*, 123 N.Y.S. 2d 501 (Surr. Ct. Monroe Co. 1953); *City Bank Farmers Trust Co.* v. *Hewitt Realty Co.*, 257 N.Y. 62, 117 N. E. 309 (Ct. App. 1931); Ballantine, *Corporations* § 231 (rev. ed. 1946).

When the requisite business justification is absent and bad faith is present, the courts have been resolute in the remedies which they will impose. These include injunctive relief compelling the declaration of a dividend in a reasonable amount, and a retention of jurisdiction to assure that reasonable dividends will be paid in following years. *Patton v. Nicholas,* 154 Tex. 385, 279 S.W. 2d 848 (S. Ct. 1955) (decree to declare dividend at earliest practical date and thereafter to declare reasonable dividends annually from future profits and accumulated surplus); *Lesnik v. Public Industrials Corp.,* 144 F.2d 968 (2d Cir. 1944) (question for jury whether directors' failure to declare dividends was pursuant to a conspiracy to acquire a shareholder's stock); *Dodge v. Ford Motor Co.,* 204 Mich. 459, 170 N.W. 668 (S. Ct. 1919) (directors ordered to distribute substantial additional dividends when reason for non-declaration was non-business purpose of providing more cars at lower price to benefit public).

What the Government argues is that the board of directors could, under applicable corporate law, improperly set dividends for the purpose of shifting income among trust beneficiaries and then build a record through minutes and otherwise of the spurious exercise of business judgment. The circumstances envisaged by the Government are the circumstances which, because they are pregnant with abuse, have induced courts of equity to apply standards of good faith and business reasonableness. What the Government describes is not a rule of law, but what one who embarks upon a campaign of fraud and bad faith, whether he be trustee or corporate fiduciary, may seek to get away with. Such is not the test of whether objective fiduciary restraints exist.

In summary, under applicable principles of corporate law, the discretion of the decedent was subject to judicial

scrutiny at the behest of affected shareholders; its range of permissible exercise was circumscribed by standards of fiduciary obligation that controlled his ability to shape dividend policy; and pursuit of a dividend policy motivated by non-business considerations would have violated such standards. As a corporate fiduciary, the decedent's discretion was subject to ascertainable external standards enforceable against him in a court of equity, so that his powers were no greater than the administrative or managerial powers that a settlor-trustee may reserve without incurring estate taxation.

II.

The decedent did not reserve the enjoyment of the transferred stock.

The Government makes the alternative argument that the decedent's right, exercisable through the board of directors, to maintain himself in corporate employment and to be compensated therefor constitutes a reservation of enjoyment of the stock transferred in trust. Pet. Br. 21-25.

The Government's argument has been rejected by the courts, not only in the decision below, but also in *Yeazel, supra,* in *Hofford, supra,* and in other Tax Court decisions hereinafter cited. No court has sustained it.

In *Hofford* a sole stockholder, immediately after entering into a contract with his corporation for a fixed salary for life, transferred the complete stock ownership to himself and others as trustees, reserving in his individual capacity the right to veto sale of the trusteed stock. The Tax Court held, after intensive analysis of the facts upon the taxpayer's motion for reconsideration, that the decedent had not reserved enjoyment of the stock and, therefore, that

the stock was not includible in his gross estate under what is now section 2036.[12] This holding is supported by two similar Tax Court decisions involving outright transfers of stock by the sole or dominant shareholder immediately after entry into a contract with the corporation for a lifetime salary. *Estate of William L. Belknap*, 10 CCH T.C.M. 769 (1951); *George C. Doerschuck*, 17 B.T.A. 1123 (1929).

These decisions are clearly correct in holding that the right or opportunity to draw a reasonable salary from a corporation does not amount to retained enjoyment of transferred stock in the corporation. A reasonable salary is earned; its *quid pro quo* is the services rendered.

The standards of fiduciary obligation that circumscribe corporate dividend policies (pp. 12-15, *supra*) also circumscribe corporate salary policies and bar the controlling shareholder from treating the corporate entity as his personal convenience. A dominant shareholder is not permitted to take advantage of his stock ownership to vote himself an excessive salary or to cause an excessive salary to be voted to him by the directors elected by him. This Court clearly recognized that principle in *Rogers* v. *Hill*, 289 U.S. 582 (1933).

The leading commentators summarize the rule as follows:

> "[D]irectors must act honestly and reasonably in setting the compensation of officers and executives

12. In the *Hofford* case the Tax Court distinguished and narrowly limited its earlier decision in *Pamelia D. Holland*, 47 B.T.A. 807 (1942), *reconsidered*, 1 T.C. 564 (1943). In the *Holland* case the decedent had retained, under an alleged contract of "sale" of the entire outstanding stock of the corporation by her and her husband to their children, an annual "salary" representing a return of approximately 20 percent of the value of the corporation's capital surplus and equalling about three and one-half times its average earnings, and caused the performance of the undertaking to be secured by the stock and by retention of all voting rights. The Government relies on *Holland* (Pet. Br. 22-23) while conveniently overlooking its having been limited by the Tax Court (4 T.C. at 794) to its peculiar facts.

. . . [I]n fixing compensation they will not be permitted to 'waste' the corporation's assets . . . [C]ompensation must bear some reasonable relation not only to the value of the services rendered but also to the ability of the corporation to pay . . . [C]ourts of equity will review the fairness and reasonableness of compensation." O'Neal and Derwin, *Expulsion or Oppression of Business Associates: "Squeeze Outs" in Small Enterprises* (1961), at 56-57. See also O'Neal, *supra*, at § 8.12.

"Stockholders or directors cannot take advantage of their ownership of a controlling interest in the corporation to vote to themselves excessive salaries or to cause excessive salaries to be voted by persons under their control. Both the stockholders and the directors in fixing compensation of officers must act in good faith and reasonably." Fletcher, *supra*, at § 2132 (perm. ed. 1967).

The Government, in describing the decedent's alleged power to avoid dividends and yet pay himself a generous salary, describes the circumstances that have impelled equitable intervention on behalf of minority shareholders. Baker and Cary, *Cases and Materials on Corporations* (3d ed. 1959), cases collected at note 5, p. 1392. These cases surely provide little incentive for a dominant shareholder to exercise his control in the manner that the Government rather cynically characterizes as a routine incident of majority shareholder status.

The enjoyment of a minority stock interest in a corporation is the prerogative of its owner. It may not legally be usurped by the controlling stockholder through abuse of corporate office. By application of these fundamental principles, it is clear that the decedent did not reserve the enjoyment of the stock that he gave away.

III.

The income tax decision of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), on which the Government relies, is legally and factually inapposite.

Having no support in the estate tax decisions, the Government relies heavily upon this Court's income tax decision in *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948). Pet. Br. 12-15, 20. In so doing, the Government looks for support to the wrong body of tax law.

Sunnen was one of a series of decisions in which this Court developed a broad economic concept of gross income in the field of intra-family trusts and assignments. *Helvering* v. *Clifford*, 309 U.S. 331 (1940); *Helvering* v. *Horst*, 311 U.S. 112 (1940); *Helvering* v. *Eubank*, 311 U.S. 122 (1940); *Harrison* v. *Schaffner*, 312 U.S. 579 (1941); *Commissioner* v. *Tower*, 327 U.S. 280 (1946); *Lusthaus* v. *Commissioner*, 327 U.S. 293 (1946). The income tax concept of substantial economic ownership developed in *Clifford* with respect to short-term trusts and in *Horst* with respect to transfers of negotiable bond interest coupons was extended in *Eubank* to assignments of life insurance renewal commissions, in *Schaffner* to assignment of specified amounts of trust income, and in *Tower* and *Lusthaus* to assignments of family partnership interests. *Sunnen*, citing and relying on this line of cases, 333 U.S. at 602-603, applied the same principle to an assignment of nonexclusive patent license contracts.

The *Clifford-Horst-Sunnen* doctrine of economic ownership flowered under the expansive wording of former section 22(a), now section 61 of the Internal Revenue Code. The doctrine has not penetrated the estate tax, the statutory provisions of which define in detail the property interests comprising the gross estate, leaving no room for the devel-

opment of any judicial theory of substantial economic ownership.

In *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56 (1942), this Court limited the *Clifford* doctrine to areas where, unlike the estate tax definition of the gross estate, "the language of a statute and its legislative history do not afford more specific indications of legislative intent." 316 U.S. at 58-59, note 1. Six years later, in setting the *Church* and *Spiegel* cases for reargument (see pp. 6-7, *supra*), this Court directed counsel to discuss the following question: "9. What is the effect of the rulings of *Helvering* v. *Clifford* (309 U.S. 331) upon these trusts?"[13] 335 U.S. at 717, note 5. Significantly, this Court, after consideration of the reargument, did not rest its *Church* and *Spiegel* decisions to any extent upon the *Clifford* doctrine.[14]

After repeatedly declining to apply the *Clifford* doctrine in any estate tax case,[15] the Tax Court definitely concluded in *Estate of Alexander K. Sessoms*, 8 CCH T.C.M. 1056 (1949):

> "Nor . . . can we hold this trust includible in decedent's estate as falling within the doctrine of the

13. The Government, conceding in its brief on reargument that, strictly speaking, *Clifford* had no estate tax application, asked this Court, in effect, to utilize *Clifford* as a pretext for overturning the *Northern Trust* decision.

14. The reasons (which we have already summarized) why the *Clifford* doctrine is inapplicable to the estate tax are perceptively stated in Justice Burton's dissenting opinion in the *Spiegel* case. 335 U.S. at 712-718.

15. *Estate of Henry S. Downe, supra; Estate of Samuel S. Lindsay*, 2 T.C. 174 (1943); *Estate of Edward E. Bradley*, 1 T.C. 518 (1943), *aff'd*, 140 F.2d 87 (2d Cir. 1944); *Estate of Edward Lathrop Ballard*, 47 B.T.A. 784 (1942), *aff'd*, 138 F.2d 512 (2d Cir. 1943); *Estate of Frederick S. Fish*, 45 B.T.A. 120 (1941); *Estate of Walter B. Roddenberry, Sr.*, 8 CCH T.C.M. 781 (1949); *Estate of Benjamin Paschal O'Neal, supra; Estate of Louis Stewart*, 4 CCH T.C.M. 59 (1945); *Estate of Maurice Markson, supra.* See also *Delaney* v. *Gardner*, 204 F.2d 855 (1st Cir. 1953); *Michigan Trust Co.* v. *Kavanagh*, 137 F.Supp. 52 (E.D. Mich. 1955).

Clifford case. See *Helvering* v. *Safe Deposit & Trust Company of Baltimore,* 316 U.S. 56, wherein the doctrine of 'substantial ownership' was rejected in the estate tax field." 8 CCH T.C.M. at 1059.[16]

Equally in point is the following statement of the First Circuit in *Higgins* v. *Commissioner,* 129 F.2d 237, 239-240 (1st Cir. 1942), *cert. denied,* 317 U.S. 658: "Helvering v. Eubank, 1940, 311 U. S. 122 . . . is another instance of a transfer where the donor must continue paying an income tax, but where the value of the property transferred will not be included in the donor's gross estate at his death."

In short, there is simply no correlation between the income and estate tax statutes in the field of incomplete transfers. See *Commissioner* v. *Douglass' Estate,* 143 F.2d 961, 963 (3d Cir. 1944); *Higgins* v. *Commissioner, supra,* at 239-241; *Federal Estate and Gift Taxes, A Proposal for Integration and for Correlation with the Income Tax,* United States Government Printing Office (1947) 9-11; DeWind, *The Approaching Crisis in Federal Estate and Gift Taxation,* 38 Calif. L. Rev. 79, 98-104 (1950). The legal irrelevance to the estate tax of the substantive income tax holding in *Sunnen* is so marked that that holding has never been referred to in any estate tax decision.

Sunnen is also factually inapposite. The taxpayer in *Sunnen,* an inventor-patentee who had entered into four nonexclusive license agreements with a controlled corporation, assigned to his wife his interest under the agreements. Either party had the right to cancel the agreements upon written notice of either six months or one year. The taxpayer retained ownership of the patents and, therefore, the right to enter into licenses with other parties, thus

16. Similarly, in *Commissioner* v. *Prouty,* 115 F.2d 331, 337 (1st Cir. 1940), the First Circuit rejected the Commissioner's argument that the *Clifford* doctrine should be imported into the gift tax law.

diverting royalties from his wife. All of these considerations, and not merely the taxpayer's role as controlling stockholder, caused this Court to conclude that the taxpayer had not effectively shifted the incidence of income tax liability.

IV.

This case calls for application of the doctrine of *stare decisis*.

The Government here asks this Court to take an initial step in undermining with retroactive effect the well-established rules with respect to managerial and administrative powers founded upon the 43-year old *Northern Trust* decision.

The Government beguilingly tries to make that initial step look as short and harmless as possible. In the process it attempts to distinguish case after case, saying: *Northern Trust, supra,* was decided under prior law (Pet. Br. 18-19); the investment powers in *King, supra,* were not over stocks of controlled corporations (Pet. Br. 11, note 5); powers held as trustee are different because they are governed by rules requiring impartiality (Pet. Br. 17-18 and 19-20); the income tax decision of *United States* v. *Gates,* 376 F.2d 65 (10th Cir. 1967), is distinguishable because the settlor in that case could not prevent sale of the trusteed stock (Pet. Br. 18, note 8).

The Government's modest statement of its goals should not deceive anyone who is familiar with its often-played role in the drama of camel's nose and tent. There are many ominous signs that the Government's objectives are much more ambitious: (1) the Government's stubborn relitigation of the *Northern Trust* holding in 27 subsequent cases; (2)

the Commissioner's outstanding nonacquiescence in the Tax Court's *King* decision, involving investment and voting powers over a securities portfolio (1963-1 C.B. 5); (3) the Commissioner's publication in 1967 of a ruling that defines the taxable area to include the situation in which the settlor is a trustee (Rev. Rul. 67-54, 1967-1 C.B. 269; see comment thereon in 21 The Tax Lawyer 444 (1968)); (4) the continuing refusal of the Commissioner to accept the Tax Court's decision in *Hofford* that the stock transferred in trust was not includible in the gross estate (nonacquiescence on that issue, 1945 C.B. 4); and (5) the assertion of tax in the estate of which the *amici curiae* are executors, despite the fact that the decedent, as one of three trustees of whom a majority could act, was powerless to prevent sale of the stock by the other two trustees.

These indicia show that it matters not to the Government whether the deceased settlor was trustee, whether the property involved is stock in a controlled corporation or liquid securities, or whether the deceased settlor could have blocked sale of the trusteed stock. If so, what prevents taxation of outright gifts of stock? In fact, the Government has attempted to tax stock given outright during life. *Estate of George H. Burr*, 4 CCH T.C.M. 1055 (1945); *Estate of William L. Belknap, supra; George C. Doerschuck, supra.*

It will not suffice for the Government to answer that the gift here was not outright, that the decedent was not trustee, that the trust assets were not portfolio securities, and that the decedent could veto sale of the stock. In an area so filled with long-established precedent, this Court should not be asked to embark on a new course without some indication of where it leads. There should be some reliable answer to whether the Government's goal here and the *Northern Trust* line of decisions can harmoniously survive

and, if so, where the line can be drawn. We respectfully submit that the only place a logical line can be drawn is where the court below has drawn it.

During the 42 years that the Treasury has fruitlessly challenged the *Northern Trust* doctrine in 27 litigations, it has worked with the Congress on five legislative restructurings of section 2036 and its predecessors: In 1931,[17] 1932,[18] 1949,[19] 1953,[20] and 1954.[21] In this process the Treasury has counseled the Congress in overturning nine decisions of this Court relating to what is now section 2036.[22] Whatever discontent the Treasury had with the *Northern Trust* holding could have been taken up with the Congress on any of those or other occasions. Having failed to utilize those opportunities, the Treasury should be foreclosed from seeking a remedy in this Court at this late date.

For the 55 years that Americans have lived and died under the regime of the Federal estate tax, apparently no trust has been taxed—certainly none willing to litigate has been taxed—because of reserved managerial or administrative powers. The Court is being asked here to subject to tax an indeterminate—perhaps broad—category of trusts that have for decades been regarded as nontaxable. The

17. Joint Resolution 529 of March 3, 1931.

18. Revenue Act of 1932, section 803(a).

19. Technical Changes Act of 1949, sections 7 and 8.

20. Technical Changes Act of 1953, section 207.

21. Internal Revenue Code of 1954, section 2036.

22. The 1931 and 1932 legislation overturned *May* v. *Heiner,* 281 U.S. 238 (1930), *Burnet* v. *Northern Trust Co.,* 283 U.S. 282 (1931), *Morsman* v. *Burnet,* 283 U.S. 783 (1931), and *McCormick* v. *Burnet, supra.* The 1949 and 1953 legislation overturned *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U.S. 108 (1945), *Commissioner* v. *Estate of Field,* 324 U.S. 113 (1945), *Goldstone* v. *United States,* 325 U.S. 687 (1945), and *Estate of Spiegel* v. *Commissioner, supra.* The 1949 and 1954 legislation overturned *Commissioner* v. *Estate of Church, supra.*

Federal estate tax is a capital levy with rates ranging upward to 77 percent. The unexpected aggregation of an *inter vivos* trust with the testamentary estate can wreak havoc with estate planning and even leave the testamentary beneficiaries penniless. If the long-established *Northern Trust* holding is to be changed, this responsibility should be left to Congress, which can give notice of the proposed change, hold hearings, make the change prospective only, create grace periods for relinquishment of taxable powers, and provide other relief. Under any reasonable view of the situation, the Government is asking the wrong body to make the wrong decision at the wrong time.

The Government has twice persuaded this Court to disregard *stare decisis* in construing what is now section 2036 of the Internal Revenue Code. The Government here invites the court to embark on a third such departure. Review of these other two instances and the Congressional overriding that followed further indicates the undesirability of the Government's present proposal. (1) In 1940, in *Helvering* v. *Hallock,* 309 U. S. 106, this Court, at the urging of the Government, expressly overruled its 1935 decisions in *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48.[23] Heeding criticism of the Court's action, Congress amended section 811(c) of the Internal Revenue Code of 1939 (now section

23. The trusts in those three cases all provided for reversion of the trust properties to the settlors if they should outlive the beneficiaries. Having decided in the two *St. Louis Union Trust* cases that passage of title to the trust properties was enough to render the predecessor of section 2036 inapplicable, the court shifted to the opposite view in *Hallock.* Over the dissenting opinion of Justice Roberts in support of *stare decisis,* this Court introduced in *Hallock* the first of a line of decisions that based the estate tax on the retention of more and more remote reversionary interests. *Fidelity-Philadelphia Trust, supra; Field, supra; Goldstone, supra;* and, finally, the controversial "gossamer thread" arising by operation of law in *Spiegel, supra,* 335 U. S. at 667-674, 703-708, 718-735.

2036 of the Internal Revenue Code of 1954) to erode the decisions and to authorize the filing of claims for refund without regard to the doctrine of *res judicata.*[24] (2) In 1949 in *Church, supra,* this Court, upon the request of the Government following the setting of the case for reargument, explicitly overruled its 18-year old decision in *May* v. *Heiner, supra,* three 1931 *per curiam* decisions that followed and extended the rule of the *May* case,[25] and its 1938 decision in *Hassett* v. *Welch,* 303 U. S. 303.[26] In the face of spirited dissents advocating the wisdom of *stare decisis,* this Court overturned 18 years of estate tax history. Heeding the resulting criticism, Congress restored the rule that *Church* had overturned.[27]

Even if the question presented here were one of first impression, the rule of law the Government seeks to establish would represent highly questionable tax policy. When the question is examined in the light of the long judicial and legislative history, the Government's request, if it should be made at all, should be made to Congress. From the standpoints of both history and logic, the Government's plea to this Court should fail.

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24. Public Law 378, 81st Cong. (Technical Changes Act of 1949), section 7; Int. Rev. Code of 1954, section 2037(a).

25. *Burnet* v. *Northern Trust Co., supra; Morsman* v. *Burnet, supra; McCormick* v. *Burnet, supra.*

26. In *May* and the three *per curiam* decisions, this Court held that retention of a life estate in transferred property did not attract the estate tax if transfer of title was effective. After Congress had enacted remedial legislation on the day following the three *per curiam* decisions, this Court decided in *Welch* that the remedial legislation applied prospectively only.

27. Public Law 378, 81st Cong. (Technical Changes Act of 1949), sections 7 and 8; Public Law 287, 83d Cong. (Technical Changes Act of 1953), section 207.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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January 21, 1972

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-308

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF MILLIKEN C. BYRUM, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Decedent transferred common stock in three corporations to an irrevocable trust reserving for his lifetime the right to vote such stock and to approve of the action of the corporate trustee before sale of the stock by the trustee. The right to vote the trusteed stock together with the vote of stock owned by the decedent gave him majority voting rights in each of the three corporations.

The question is whether under these circumstances

decedent retained for his life the right to designate the persons who would enjoy the income from the stock or the right to the possession or enjoyment or the right to the income from the stock within the meaning of Section 2036 (a) of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The decedent during his lifetime created an irrevocable trust for the benefit of his children until age 35 (R. 16); naming a national banking corporation as trustee (R. 9, 16, 17). Until the youngest child reaches age 21, the trustee has sole discretion to make distributions of income or corpus to or for the benefit of a child or his issue with due regard to his individual need for education, care, maintenance and support (R. 14). After the youngest child has reached age 21 the trust is to be divided into separate trusts for each living or deceased child (R. 14). Each trust is to terminate when its beneficiary reaches age 35 (R. 16). The trustee is authorized to pay income and principal from the separate trusts if the beneficiary has an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of the beneficiary (R. 15).

The trust agreement further provides that all voting rights of any stocks not listed on a stock exchange shall be exercised by decedent and, after his death, his wife (R. 11).

There is included in the corpus of the trust unlisted voting stock in three corporations. The right to vote the stock transferred to the trust together with the vote of the stock owned by decedent gave him a majority vote in each of the three corporations. From the time of the creation of the trust until decedent's death, there were minor-

ity stockholders in each of the corporations (R. 30-32).

The corpus of the trust includes assets in addition to the unlisted stock. (R. 20-29).

No distributions of income or principal were made by the corporate trustee during decedent's lifetime. (R. 20).

SUMMARY OF ARGUMENT

I

The tax under Section 2036 (a) (2) is by its terms a tax on the "right *** to designate the persons who shall possess or enjoy the property or the income therefrom". Taxation is thus based upon the presence of a prerogative in the decedent to overtly choose those persons who will possess or enjoy the transferred property or its income. The shifting of economic benefit as an incidental consequence of the exercise of fiduciary responsibilities—whether created by the transfer or arising collaterally—does not constitute a "right *** to designate".

If the decedent in this case had the capacity to shift economic benefit by controlling the flow of dividend income to the trust, through his majority voting control, it was only as an incidental consequence of his fiduciary position as majority voting stockholder or corporation director. His relationship to the corporations and to all of their stockholders was one of trust. See *Pepper* v. *Litton*, 308 U.S. 295 (1939); *United States* v. *Gates*, 376 F.2d 65 (10th Cir. 1967) *Selama-Dindings Plantations, Ltd.* v. *Durham*, 216 F. Supp. 104 (S.D. Ohio W.D. 1963); *State* v. *Witmore*, 126 Ohio St. 381 (1923). Any control he might have had over dividends (through his control of directors, themselves fiduciaries) was subject to the rule that directors are permitted to exercise business judgment as to the need to accumulate earnings, subject, however, to the general right of the stockholders to the profits of the business. Cf. *United States* v. *Gates*, supra; *Santarelli* v. *Katz*, 270 F.2d 762 (7th Cir. 1959); *Doherty* v. *Mutual Warehouse Company*, 245 F.2d 609 (5th Cir. 1957); *Wilberding* v. *Miller*, 90 Ohio St. 28, 42 (1914); *Arbuckle* v. *The Woolson Spice Co.*, 21 Ohio C.C.R. 356 (1901). A rule which operates upon standards at least

as objectively determinable as those limiting the power of a settlor-trustee to invade corpus "to suitably maintain [the life beneficiary] in as much comfort as she now enjoys", or to use corpus "for maintenance, welfare, comfort or happiness" of the income beneficiaries and for the "education" of the remaindermen, or to use income otherwise to be accumulated "to enable the beneficiary to maintain himself and his family, if any, in comfort and in accordance with the station in life to which he belongs", or to invade corpus for the "suitable support, education and maintenance" of any income beneficiary.[1]

Furthermore, where, as here, dividends are not fixed by contract, no shifting of dividend income is occasioned by a legitimate business decision to pay, or not to pay, dividends. Only in the event that dividend policy is based upon private interest or purpose—and, accordingly, in breach of the fiduciary obligations of directors — can shifting be held to occur.

Contrary to the case petitioner argues, *Byrum* does not present the circumstance of a right to shift economic benefit, said to be the basis for taxation under Section 2036 (a) (2), and the Court of Appeals correctly decided this issue against petitioner's contention.

II

The *Byrum* trust is irrevocable. The trustee is a national banking corporation. Decedent retained no right to income or other pecuniary benefit from the trust or any reversionary interest (by the terms of the trust or operation of law) in the trust corpus. His reserved power to vote the trusteed corporate common stock is likened

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1. Powers held to be subject to judicially enforceable standards in: *Ithaca Trust Company* v. *United States*, 279 U.S. 151 (1929); *United States* v. *Powell*, 307 F. 2d 821 (10th Cir. 1962); *Jennings* v. *Smith*, 161 F. 2d 74 (2nd Cir. 1947); *Estate of Ralph Budd*, 49 T.C. 468 (1968).

to any fiduciary administrative power and could have operated only indirectly, if at all, to his economic benefit.

The question under Section 2036 (a) (1) is not whether decedent retained incidents of ownership in the stock transferred, but whether he retained the right to the substantial present economic benefit of the stock. On this question, the Court of Appeals correctly held for respondent.

ARGUMENT

I. DECEDENT'S POWER UNDER TERMS OF TRUST TO VOTE UNLISTED STOCK DID NOT AMOUNT TO A RIGHT TO DESIGNATE WHO SHALL POSSESS OR ENJOY THE PROPERTY OR INCOME THEREFROM WITHIN THE MEANING OF SECTION 2036 (a) (2).

A. Decedent Did Not Retain A "Right" To Designate Within The Meaning of Section 2036 (a) (2)

Section 2036 (a) (2) taxes transfers under which the decedent has retained for his life "the right *** to designate the persons who shall possess or enjoy the property or the income therefrom". The language "right to designate", in its normal usage, comprehends an express or immediate power to choose.[2] Certainly it implies more

2. Pedrick, "Grantor Powers and Estate Taxation: The Ties That Bind", 54 Nw. U.L.R. 527,555 (1959), puts forth this proposition as follows: "An evaluation of this recent decision [*State Street Trust Co. v. United States*, 263 F. 2d 635 (1st Cir. 1959)] calls for a reexamination of the operative principles of sections 2036 and 2038 to determine their applicability to administrative powers. Both sections aim at purposeful changing of beneficial interests in a trust. Section 2036 deals with a right to designate the persons to enjoy the income and under this section a taxable power must be a power that enables a conscious permissive choice of ultimate income recipients. Section 2038 taxes powers to alter, amend, revoke or terminate and as construed by the courts reaches a power to change beneficial interests both as to identity of the beneficiary and the time of taking. But here again a power to so change interests assumes a right to make a knowing choice in beneficiaries or in timing". (The rule of *State Street Trust Co.* was later rejected in *Old Colony Trust Company v. United States*, 423 F. 2d 601 (1st Cir. 1970).

than an incidental consequence from the exercise of an unrelated fiduciary obligation.[3] Cf. *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1928); *United States* v. *Powell*, 307 F.2nd 821 (10th Cir. 1962); *Cushman* v. *Commissioner*, 153 F.2nd 510 (2nd Cir. 1946); *Estate of Willard V. King*, 37 T.C. 973 (1962).

Majority stockholders, as well as directors, stand in a fiduciary relationship to the corporation and to minority stockholders. See *Pepper* v. *Litton*, 308 U.S. 295 (1939); *United States* v. *Gates*, 376 F2nd 65 (10th Cir. 1967); *Selama-Dindings Plantations, Ltd.* v. *Durham*, 216 F. Supp. 104 (S.D. Ohio W. D. 1963); *State* v. *Witmore*, 126 Ohio St. 381 (1923); *Thomas* v. *Matthews*, 94 Ohio St. 32 (1916). This relationship touches all aspects of corporation life, and directors may not defer payment of dividends for the purpose of defeating the rights of stockholders or a particular group of stockholders to the profits of the corporation. Cf. *United States* v. *Gates*, 376 F.2d 65 (10th Cir. 1967); *Oppenheimer* v. *Oppenheimer Printing Co.* 24 Ohio N.P. (n.s.) 483, 488 (1923); *Arbuckle* v. *The Woolson Spice Co.*, 21 Ohio C.C.R. 356 (1901).

The power of the decedent here was no greater than the power of the directors he was allegedly able to dominate. Under the circumstances of this case, directors could not, without breaching their trust, have adopted a dividend policy to serve the personal interest of the decedent if such policy conflicted with the interest of the corporation and the stockholders. From a practical consideration, it is unlikely that minority stockholders would permit

3. Treas. Reg. 20.2041, provides with regard to powers of appointment: "***The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercised in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of such fiduciary duties is not a power of appointment.***"

the manipulation of dividends to the prejudice of the stockholders.[4] Certainly, the circumstantial effect on trust income caused by the discharge of the fiduciary power of directors over dividend payment does not amount to a "right *** to designate" the persons who will possess or enjoy the trust property or its income.

In reality, it appears that decedent lacked even this incidental power to affect distributions from the trust.

The *Byrum* trust is a discretionary trust created for the benefit of the children of the decedent, continuing until the children reach age 35. It provides (Article VI, R. 14) that the trustee may, in its discretion, make distributions of income or principal to a child or children, before he or they have reached age 21, "with due regard to the individual needs, education, care, maintenance and support" of the child or children. It further provides (Article VI, R. 15) that after the youngest child has reached age 21, the trustee may make distributions of income or principal to or for the benefit of a child should such child "have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child". Thus the power to control the present economic enjoyment of the trust assets is lodged solely in the trustee, who is empowered to make distributions from either income or corpus. This disjunctive power in the trustee to distribute either corpus or income blunts even the incidentally consequential power to shift income that might otherwise exist through corporate dividend action.

In summary, Section 2036 (a) (2) is directed at transfers in which the transferor expressly reserves the power to choose the ultimate income beneficiaries or in which a conscious power to choose is held by the transferor as

4. It is also unlikely that the trustee could stand passively by if profits were being unwarrantedly withheld.

an incident of the transfer. *Byrum* fits neither of these statutory patterns.

B. Corporate Decisions To Pay Or Defer Dividends Did Not Cause A Shifting Of Economic Benefits

The Government rests its case for taxation under Section 2036 (a) (2) largely on *Commissioner* v. *Sunnen,* 333 U.S. 591 (1948), an income tax case. It further seeks to foreclose argument as to its relevancy to the estate tax by asserting "it is no answer to say that *Sunnen,* an income tax case, is inapposite to the situation at hand".[5] There is considerable divergence, however, between the two taxes and the rules applicable to income tax are not necessarily applicable to estate tax. *Sunnen* is not precedent for the tax here.

Sunnen falls within the *Clifford, Horst* line of cases[6] which struck down income splitting through the devices of family trusts and transfers within an intimate family group. The Court held in *Sunnen* that the grantor of rights under licensing agreements with a corporation he dominated had retained the power—through his control of the corporation and retained ownership of the patents that produced the royalties—to procure cancellation of the contracts causing the income and property to revert to himself. Rejecting the argument that cancellation would be an actionable fraud upon the corporation, the Court reasoned that cancellation could also occur as the result of legitimate business decision and this possibility required the income from the licenses to be included in the taxpayer's gross income under the broad concept of gross income contained in Section 22 (a) of the Revenue Acts of 1936 and 1938. Petitioner argues that this same

5. Petitioner's Brief, page 13.

6. The early leading cases were *Helvering* v. *Clifford,* 309 U.S. 331 (1940); *Helvering* v. *Horst,* 311 U.S. 112 (1940); *Helvering* v. *Eubank,* 311 U.S. 122 (1940); *Commissioner* v. *Tower,* 327 U.S. 280 (1946).

kind of legitimate business option—to pay or defer dividends—was open here, with the same taxable result. The result does not follow, however, under the narrower reach of Section 2036 (a) (2).

The "legitimate business option" reasoning of *Commissioner* v. *Sunnen,* would only be applicable to *Bryum* if there were a fixed right to dividends or a determinable dividend rate. Absent some such measurable income, a legitimate business decision to pay or to defer dividends would not, under the facts of *Byrum,* cause a shifting of economic benefits. Any dividends declared were paid, unequivocally, to the trust. If not declared there was no income to shift and any economic benefit from retained earnings was reflected in the value of the stock and inured to all beneficiaries,[7] income and contingent remainder,[8] as their interests appeared.

It is only in the event that a board of directors acts out of private interest—as opposed to the corporation's legitimate business interest—that it can be said that there is, in any real sense, a shifting of economic benefits. And in such event directors will have breached their fiduciary duty to the corporation and to all of its stockholders.[9] A fiduciary duty which is measured by judicially enforceable standards at least as rigorous as the administrative standards imposed on trustees.

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7. On comparable facts, it was held in *Yeazel* v. *Coyle,* 68-1 USTC, ¶12,524, page 87,387: "***It is true that by reason of retaining the voting rights, Mrs. Crowley remained in the position of controlling the dividend policy in the corporation and the distribution of income to the beneficiaries. Although Mrs. Crowley could have prevented the corporation from paying a dividend, that action would not have deprived the beneficiaries of the possession or enjoyment of either the property or income because the retained earnings of the company would increase, thus making the beneficiaries' stock more valuable***".

8. The children of decedent are given a testamentary power of appointment to their spouses or children upon their death before age 35 (Article II, R. 15; 16).

9. *Gottfried* v. *Gottfried,* 73 N.Y.S. 2d 692 (1947); *Dodge* v. *Ford Motor Co.,* 204 Mich. 459, 170 N.W. 668 (1919); *Arbuckle* v. *The Woolson Spice Co.,* 21 Ohio C.C.R. 356 (1901).

In *Yeazel* v. *Coyle*, the decedent transferred to herself as trustee shares of stock in a corporation in which she was, prior to the transfer, sole shareholder. The trust instrument gave her broad authority to sell and invest the trust corpus without the limitation of any statute or rule of court concerning investment by trustees and she was empowered "to vote all stock held as part of the trust property". The government contended that the voting rights in the stock she owned together with her right to vote the trusteed stock gave her the same voting position she occupied before the transfer and the ability to control the corporation, including the distribution of dividends. Holding against the government, the court stated:

> "If the Governments' argument were carried to its logical conclusion, the donor of the stock in a closely held corporation would be required to divorce himself of all remaining interest in the corporation in order to make his gift effective for tax purposes. The sweep of Section 2036 (a) is not that broad. ***"
>
> (68-1 U.S.T.C. page 87, 387).

The decision of the Court of Appeals below, and the position of respondent, is also supported by *Estate of Willard V. King*, 37 T.C. 973 (1962).

In *Estate of Willard V. King*, the settlor reserved for his life the power to direct the trustee in the management and investment of the property (stock in closely held corporations) in three trusts which provided that the income be paid to the settlor's three children with remainders over to designated beneficiaries. Against the government's argument that the settlor could cause investments to be made in wasting assets or non-income producing property, as he desired, and thereby control the flow of income to beneficiaries, the Tax Court held:

> "It is our conclusion that insofar as the management of the trust in the instant case was concerned, the

grantor had in effect made himself a fiduciary and that under the law of New York he was not at liberty to administer the trust for his own benefit or to ignore the rights of the beneficiaries, even though he no doubt would be permitted wide latitude in the exercise of his discretion as to the types of investments to be made."
(37 T.C. 980)

Petitioner's attempt to discount the *King* case on the basis that the court specifically found that the securities were at no time significant from the point of view of control of the particular companies involved is not persuasive. The settlor in *King* had immediate control over the income produced by the trust property through his investment power. The power sought to be taxed here, on the other hand, is an oblique power which affects trust income, if at all, only incidentally as the result of the discharge of corporate fiduciary duties. *King* is, a *fortiori*, dispositive of the issue here.

We submit that the government has failed to build a case for the estate tax on *Commissioner* v. *Sunnen* and that under the circumstances of *Byrum* the decedent did not retain the power to shift the economic benefits of the property transferred.

C. Decedent Held No More Than
A Power Of Management

The power retained by the *Byrum* decedent was, at the very most, a power of management and within the shelter of the long established doctrine of the cases that powers of administration or management are not taxable powers under either Section 2036 or Section 2038. See *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1928); *United States* v. *Powell*, 307 F.2d 821 (10th Cir. 1962); *Estate of Ralph Budd*, 49 T.C. 468 (1968); *Estate of Marvin L. Pardee*, 49 T.C. 140 (1967); *Estate of Frederick M.*

Kasch, 30 T.C. 102 (1958); *Estate of Pierre Jay Wurts,* 19 T.C.M. 544 (1960); *Estate of Aline Peters Peters,* §64,167, P-H Memo T.C. (1960).

In *Reinecke* v. *Northern Trust Co.* the decedent in his lifetime established several trusts creating life interests in the income and reserving to himself, among other powers, the power to supervise reinvestment of trust funds, to require the trustee to execute proxies to his nominee to vote shares of stock held by the trustee and to control leases executed by the trustee. Holding that the transfers in trust were not in contemplation of or intended to take effect in possession or enjoyment at or after death under §401 (c) of the Internal Revenue Act of 1921 the Court reasoned:

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax".
>
> (278 U.S. 346)

Reinecke cannot be disposed of, as petitioner would dispose of it, on the basis that it preceded the original enactment of what is now Section 2036. It is in principle determinative of the issue here.

Significantly, this Court had opportunity in both *Commissioner* v. *Estate of Church,* 335 U.S. 632 (1949) and *Estate of Spiegel* v. *Commissioner,* 335 U.S. 701 (1949)

to overrule its *Reinecke* decision on the question of reserved powers of management but did not. Every decision since has followed the *Reinecke* rule that managerial powers are not taxable.[10]

In *United States* v. *Powell*, supra, the Court was asked to hold that the broad investment power of the trustees — one of whom was the settlor — required inclusion of the trust assets in the settlor's estate. The court decided against the government, however, stating:

> "We conclude the investment power given to the trustees by the trust instrument was subject to and limited by a judicially enforceable external and ascertainable standard and, hence, was no more than a management or administrative power, and that in exercising it, the settlor acted in a fiduciary capacity, as trustee, and not individually." (307 F. 2d 826)

The court also reasoned that in exercising a power to invade the corpus for the maintenance, welfare, comfort, education or happiness of the remainder beneficiaries, the trustees were subject to the supervision of the Kansas courts in the exercise of equity powers and, accordingly, that the trust contained an acertainable and judicially enforceable standard and was not, therefore, because of this power, includable in the gross estate.

Likewise, in *Estate of Marvin L. Pardee,* the Tax Court held that the power of the grantor-trustee to pay out or retain corpus and income on the basis of "other needs*** occasioned by emergency" was not an arbitrary power under Michigan Law requiring the inclusion of the trust in the taxable estate of the grantor.

In *Estate of Ralph Budd,* authority in the settlor as co-trustee to invade one of two trusts for the benefit of the

10. In addition to the above cases, the following cases are in accord with *Reinecke* and contrary to the government's position here: *Ford's Estate* v. *Commissioner*, 53 T.C. 114 (1969); *Estate of James H. Graham*, 46 T.C. 415 (1966); *Estate of C. Dudley Wilson*, 13 T.C. 869 (1949); *Estate of George W. Hall*, 6 T.C. 933 (1946); *Estate of William F. Hofford*, 4 T.C. 790 (1945); *Estate of Henry S. Downe*, 2 T.C. 967 (1943); *Estate of Pierre Jay Wurts*, T.C. Memo, 1960-102.

income beneficiary in the event of "sickness, accident, misfortune, or other emergency" and to invade the second trust for the "suitable support, education and maintenance", of any income beneficiary was held to reflect external standards to which a court of equity would give effect.

The donor in *Estate of Aline Peters Peters,* elected, under an option given her by the trust instrument, to exercise in her sole discretion the management and investment of the trust during her lifetime. It was held that this reserved power of management did not require the inclusion of the trust property in the decedent's estate.

The trust in *Estate of Frederick M. Kasch,* provided that the income was to be accumulated but gave to the grantor-trustee power to invade corpus for proper care, support and medical attention "in their uncontrolled discretion". The Tax Court held this to be a non-taxable power under both Section 2036 and Section 2038.

Contrary to the petitioner's recurrent claim, the fiduciary standards of corporate management are not based upon inexact concepts of honesty and reasonableness but upon objective business factors which constantly figure in the judicial disposition of corporate disputes and transactions. They are at least as restrictive as standards of trust management and administration. Governed by such standards, the decedent in the case at bar had no right to designate the persons who would possess or enjoy the unlisted stock or the income therefrom within the accepted meaning of Section 2036 (a) (2). A reversal of the Court of Appeals in this case will be a reversal of *Reinecke* v. *Northern Trust Co.* and a repudiation of the rule that reserved powers of management are not taxable.

II. RESERVATION OF THE RIGHT TO VOTE STOCK TRANSFERRED TO AN IRREVOCABLE TRUST DID NOT CONSTITUTE RETENTION OF THE

POSSESSION OR ENJOYMENT OF THE STOCK WITHIN THE MEANING OF SECTION 2036 (a) (1)

Argument of petitioner on this issue assumes that the language "the possession or enjoyment of, or the right to the income from, the property", contained in Section 2036 (a) (1), has a single transactional purpose i.e. that it is intended to reach a transaction in which the transferor has retained either the right to the income from the property transferred or the right to possession or enjoyment of the property without right to income. There is reason to conclude, however, that "possession or enjoyment" was intended to have reference only to a power over non-income producing property.[11] And that the right to income from income producing property is solely determinative of the tax under the statute. If the right to income is pivotal, there is no tax in the case at bar because the decedent retained no right to the income from the stock, an income producing property. Assuming, however, *arguendo,* that under the statute, as it applies to income producing property, the right to income and the right to enjoyment are distinct and the retention of either incites the tax, the stock in question is still not taxable in decedent's estate here.

As stated and documented by petitioner in its brief, this Court has repeatedly held that the term "enjoyment" as used in the estate tax statutes is synonymous with substantial present economic benefit. The question, then, is whether this decedent retained the right to the substantial present economic benefit of the stock transferred.

The facts are that he did not retain title to the stock

11. H. R. Rep. No. 1412 (Conf.), 81st Cong. 1st Sess., 5 (1949) "The income interests described in Section 2036 (a) ***include reserved rights to income from transferred property and rights to possess or enjoy non-income producing property." See also Covey "Section 2036—The New Problem Child of the Federal Estate Tax", 4 Tax Counselor's Quarterly 121, 129 (1960).

or the right to receive either cash or stock dividends from the stock. Nor did he reserve either the right to sell, pledge, assign or dispose of the stock, in any way, or the right to receive the proceeds from a sale or other disposition of the stock. All of these passed unequivocally from him. He did retain the right to vote the stock and to approve its sale during his lifetime.

If enjoyment is synonymous with present economic benefit, enjoyment of the stock transferred passed in this case to the trust beneficiaries. Cf. *Commissioner* v. *Estate of Church,* 335 U.S. 632 (1949); *Estate of McNichol* v. *Commissioner,* 265 F. 2d 667 (3rd Cir. 1959);[12] *Reish* v. *Commonwealth,* 106 Pa. 521 (1884).[13]

Notwithstanding, petitioner argues that decedent retained some of the rights of enjoyment and this, on the basis of *Commissioner* v. *Estate of Church,* was cause for the tax.

This argument is founded, in effect, on a bundle of rights theory or an incidents of ownership concept which has no validity as a test under Section 2036 (a) (1). It is logical to conclude that Congress would have used language similar to that employed in Section 2042.[14] had it intended the statute to operate on this kind of a test.

12. In *McNichol,* the court held "***If, as was said in Commissioner v. Estate of Church, supra, 335 U.S. at page 645, 69 S. Ct. 322, the most valuable property attribute of stocks is their income, it is no less true that one of the most valuable incidents of income—producing real estate is the rent which it yields. He who receives the rent in fact enjoys the property". (265 F.2d 671)

13. *Reish* v. *Commonwealth,* is credited as the first reported case to consider the meaning of the term "possession or enjoyment". Note, 56 Yale L.J. 176 "Origin Of Phrase Intended To Take Effect in Possession Or Enjoyment At Or After Death". It was held in *Reish,* "One cannot be considered as in actual enjoyment of an estate who has no rights to the profits or incomes arising or accruing therefrom—.

14. The value of the gross estate shall include the value of all property—

*** *** ***

(2) To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable alone or in conjunction with any other person.***"

Furthermore, if petitioner's position here is correct, there would appear to be no need for the enactment of Section 2042, for any incident of ownership or property right in an insurance policy would constitute "possession or enjoyment" and be taxable under either Section 2036 or Section 2037.

The *Church* case does not support petitioner's position. The sweeping language of the *Church* opinion must be gauged against its judicial setting. *Church*, overruled the controversial *May* v. *Heiner*, 281 U.S. 238 (1930), to tax transfers, made before March 4, 1931, in which the transferor retained a life estate in the property transferred.[15] The Court did declare that to escape estate tax a settlor must be left with "no right***to enjoy the property" transferred, but further declared that "enjoyment" was synonymous with substantial present economic benefit.

Church ought not be considered as standing for more than it actually decided. The feature of the transfer that produced the tax in *Church* was the retention by the decedent of the income and profits from the property transferred. The significance of *Church* as precedent in the case at bar is found in the language "***[a] after such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title and no right to possess or to enjoy the property then or thereafter". (335 U.S. 645). The implication is clear that the court considered the right to receive the income and profits from the transferred property to be tantamount to possession and enjoyment of the property.

Speculation that decedent while not retaining any di-

15. The conclusion is easily reached and has often been suggested that the predecessor of Section 2036 (a) (1) was solely intended to reach the *May* v. *Heiner* type transfer.

rect economic benefit from the stock transferred was in a position to perpetuate himself in office and fix his own compensation and receive liberal retirement and fringe benefits ought not be made the basis for tax. It assumes that the board of trustees would act in disregard of the best interests of the corporation and its stockholders and contrary to its trust. The same argument could be made if decedent had not retained the right to vote this stock. A similar argument was dismissed in *Commissioner v. Douglass' Estate*, 143 F. 2d 961, 963 (3rd Cir. 1944) as follows:

> "***The Commissioner's argument that these trustees would be likely to do what he [settlor] asked of them about assigning income for the support of a minor child departs from the 'practical' and 'realistic' approach we are asked, in the same argument, to take. We have no notion what the trustees would have done had such a request been made. It is apparent, from the terms of the instrument, that the settlor could not direct or control the matter, once the trust settlement had become effective."

This same kind of speculation was rejected in *Yeazel v. Coyle*, supra.

If the reach of Section 2036 (a) (1) is judged on its statutory language and not on the sweeping declarations by petitioner of its overriding purpose, it does not support taxation of the transfer in dispute. The question is not what the law should be in this area but what the law is and the Court of Appeals below correctly decided the question before it.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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January 24, 1972

FILE COPY

No. 71-308

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN A. BYRUM, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF MILLIKEN C. BYRUM, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,

MATTHEW J. ZINN,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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REPLY BRIEF FOR THE UNITED STATES

Respondent and *amici* would have this case decided by reference to the proposition that a grantor who retains only managerial and administrative powers over a trust has not retained "the right * * * to designate" within the meaning of Section 2036(a)(2) of the Code. They ask also that this case be decided under the authority of this Court's 1929 decision in *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339. In so contending, they seek to divert attention from the problems of their own case and to have another decided in its stead. This case is not one involving

merely retained managerial or administrative powers over a trust, and *Reinecke* v. *Northern Trust Co.* would not control decision even if it were.

1. The sole basis for the proposition asserted by respondent and *amici* is set forth in the Tax Court's opinion in *Estate of King* v. *Commissioner*, 37 T.C. 973, upon which they place major reliance (Br. 11-12; *Amici* Br. 9). It is, in short, that the broad discretionary powers retained by the grantor with respect to management and administration of the trust must at all times be exercised in good faith, in accordance with fiduciary standards, and with due regard for the interests of the beneficiaries of the trust. On this basis, it is concluded that the grantor's retained powers are circumscribed by a judicially enforceable objective and external standard, and do not constitute the right to designate.

In reaching this conclusion, the lower courts have not always differentiated between the retention of those powers necessarily conferred upon a trustee, and the retention of additional powers which, for all practical purposes, enable the grantor materially to shift the enjoyment of trust income between current beneficiaries and remaindermen. Thus, it has been held that property transferred in trust is not includable in the grantor's gross estate under Section 2036 (a)(2) even though he may have retained such powers as the power to invest in any type of property, including wasting assets, without the duty to diversify investments, and the powers to determine, in his absolute discretion, whether receipts constituted income or principal, and whether expenses should be

charged against principal or income. See, *e.g.*, *Estate of King v. Commissioner, supra; Old Colony Trust Company* v. *United States*, 423 F.2d 601 (C.A. 1). Although recognizing that, within the bounds established and maintained by courts of equity, grantors have wide latitude in exercising such retained powers, the lower courts have labelled them as merely managerial or administrative powers and, without further analysis, have held them not to make a transfer taxable at death.

We question whether such holdings can always be squared with this Court's decisions in *Commissioner* v. *Estate of Holmes*, 326 U.S. 480, *Lober* v. *United States*, 346 U.S. 335, and *United States* v. *O'Malley*, 383 U.S. 627. In these decisions, remarkably ignored by respondent and *amici*, this Court properly has been sensitive to the mandate of Sections 2036 and 2038, under which property, though beyond the grantor's power to retake, is includable in his gross estate if he has retained control over the actual or immediate enjoyment of the income or principal. This Court has eschewed decision by label, and has instead inquired into the substance of the powers retained by the grantor.

Judged by these standards, and particularly in view of the Court's recognition in *O'Malley* that the power to accumulate income (which might also be described as an administrative power) constitutes the right to designate under Section 2036(a)(2),[1] it is

[1] See *Industrial Trust Co.* v. *Commissioner*, 165 F. 2d 142 (C.A. 1), cited with approval in *O'Malley, supra*, 383 U.S. at 631-632.

difficult, if not impossible, to reconcile many of the lower court decisions with those of this Court. To say with regard to the former cases that the power of the grantors to shift enjoyment was limited by their fiduciary duty to act in good faith in the best interests of the beneficiaries does not adequately distinguish *O'Malley*. The power of the *O'Malley* grantor to accumulate would also have to be exercised in good faith in accordance with his fiduciary responsibility, but since the grantor nevertheless has considerable leeway in exercising such a power, which is not subject to any discernible objective limitation, this is enough to support the tax.

2. But whether or not the proposition regarding managerial and administrative powers over a trust would stand the scrutiny of this Court, it has no bearing on the outcome of the instant case. Decedent here retained not merely managerial and administrative powers over a trust, but full control over the affairs of three corporations. Respondent and *amici* in effect are asking this Court to shut its eyes to the fact that, in the proper exercise of managerial and administrative powers, a controlling stockholder has a significantly greater opportunity to regulate the flow of income to trust beneficiaries than a mere trustee. Compare *Commissioner* v. *Sunnen*, 333 U.S. 591, 608-610, with 1 *Restatement of Trusts 2d*, §§ 232, 236(g) (Comment y). The powers of the controlling stockholder are limited only by such duty as he may owe to his corporation and its stockholders as such. If he fulfills that duty, he is not answerable in any court, regardless of the underlying, and pos-

sibly competing, interests of the trust beneficiaries, or the effect that the corporate decision may have upon them. The mere trustee, on the other hand, must exercise his powers exclusively by reference to the needs and interests of the life tenants and remaindermen. There is thus absent here (and in *amici's* case as well) the sole basis for the proposition which respondent and *amici* press upon this Court—that the trustee's powers are circumscribed by the undivided fiduciary obligation he owes to the beneficiaries of the trust.

If the teaching of *Holmes, Lober* and *O'Malley* is to be followed, then surely it means nothing less than that the proposition upon which respondent and *amici* rely (assuming that propositon remains viable) is not to be extended by further labelling. Respondent and *amici* concede as much in failing to undertake to distinguish, or, for that matter, even to cite, any of these decisions.

3. Rather, they prefer to rest their case on *Reinecke* v. *Northern Trust Co.* and its progeny, and insist (Br. 13, 15; *Amici* Br. 10) that a decision for the government in this case would require the overruling of that case. This is incorrect. The governing statute in *Northern Trust* was the Revenue Act of 1921 (c. 136, 42 Stat. 227), under which transferred property could be included in the grantor's gross estate only if he had power to revest the property or the income from it in himself. The government's argument here, however, is founded on decedent's power to shift enjoyment between beneficiaries, a retained power that was made taxable for the first

time by the Revenue Act of 1924 (c. 234, 43 Stat. 253). *Northern Trust*, therefore, provides no comfort for respondent or *amici*.[2]

Nor are they aided by the Court's failure to overrule *Northern Trust* after inviting argument on the question in *Commissioner* v. *Estate of Church*, 335 U.S. 632, and *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701. The Court held for the government in both cases on other grounds, and thus did not find it necessary to pass on the question. Its failure to do so can hardly be taken as an endorsement of *Northern Trust*, as respondent and *amici* would have it (Br. 13-14; *Amici* Br. 6-7). Far more significant, we believe, is the fact that, in the 23 years that have passed since *Church* and *Spiegel* were decided, reference to *Northern Trust* is nowhere to be found in the reports of this Court's opinions.[3]

---

[2] *Amici* are confused (*Amici* Br. 10, n. 9) regarding the relationship between *Northern Trust* and the Revenue Act of 1924, which was approved on June 2 of that year. Section 301(a) of the Act made it operative with respect to the estates of decedents dying after the enactment of the Act. Since the *Northern Trust* decedent died on May 30, 1922 (278 U.S. at 343), the 1924 Act was not involved in that case. However, the Act (Section 302(d) and (h)) did have a retrospective feature that did not come into play in *Northern Trust*. It applied to *inter vivos* transfers effected before enactment, but only if the decedent died after enactment. Cf. *Porter* v. *Commissioner*, 288 U.S. 436.

[3] *Northern Trust's* limited relevance under the later statutes had been recognized by the Court long before *Church* and *Spiegel* came on for argument. See *Porter* v. *Commissioner*, 288 U.S. 436, 442; *Helvering* v. *City Bank Co.*, 296 U.S. 85, 88-90; *Helvering* v. *Helmholz*, 296 U.S. 93, 97-98.

In sum, then, we agree with respondent and *amici* that this case calls for application of the doctrine of *stare decisis*. But since *Northern Trust* was decided before enactment of the predecessors of the statutes now in force, it would not be authoritative even if the issue posed were one involving only managerial and administrative powers over a trust. *A fortiori*, it is not a guide to decision where, as here, we are concerned with retained powers over all aspects of corporate operation. The controlling precedents are *Holmes*, *Lober* and *O'Malley*; and they require reversal of the judgment below.

Respectfully submitted.

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ERWIN N. GRISWOLD,
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PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, the petitioner, the United States of America, respectfully, and reluctantly, petitions the Court for a rehearing of its decision in this case. It is constrained to do so because the opinion of the Court heavily qualifies, if, indeed, it does not overrule *sub silentio*, prior decisions of the Court that have stood for years as unquestioned authorities with reference to the estate tax.

The decision not only substantially compromises the estate tax by permitting owners of the shares of family or other closely held corporations to retain control during life and, at the same time, to avoid the tax.[1] It also restricts, by its reasoning, what heretofore has been regarded as within the clear reach of the tax. And it might be construed to foreclose consideration of at least one important question not heretofore presented to the Court, not fully presented in this case, and not necessarily involved in the decision herein.

The Court sets forth in Part I of its opinion its decision relating to the Government's Section 2036(a)(2) arguments (Op. 18-19):

> We conclude that Byrum did not have an unconstrained *de facto* power to regulate the flow of dividends to the trust, much less the "right" to designate who was to enjoy the income from trust property. * * *
>
> We find no merit to the Government's contention that Byrum's *de facto* "control," subject as it was to the economic and legal constraints set forth above, was tantamount to the right to desig-

[1] The implications of this decision have been quickly recognized by the tax bar. On July 17, 1972, *Lawyer's Weekly Report*, p. 106, hailed the decision as a "Sweeping Taxpayer Victory," commenting that: "The new case charts a safe way the major owner can give all or part of his stock in trust to his family, while still retaining virtual control over his company, without having the gift taxed in his estate." See also The Kiplinger Tax Letter, June 30, 1972, p. 3: "Owners of closely held firms get a new way to beat estate tax * * *. Sounds almost too good to be true, but Supreme Court gives its blessing."

nate the persons who shall enjoy trust income, specified by § 2036(a)(2).

As grounds for rehearing, the petitioner sets forth, in brief form, the following:

1. Neither the statute, the regulations, nor the previous decisions of this Court require that the right or power "to designate the persons who shall possess or enjoy the property or the income therefrom" be unconstrained or unqualified either factually or legally.

Section 2036(a) includes in the gross estate property transferred "by trust or otherwise" under which the decedent has retained the right in question "either alone or in conjunction with any person." Treasury Regulations on Estate Tax (1954 Code) § 20.2036-1(b)(3) (26 C.F.R.) provides:

> With respect to such a power, it is immaterial (i) whether the power was exercisable alone or only in conjunction with another person or persons, whether or not having an adverse interest; (ii) in what capacity the power was exercisable by the decedent or by another person or persons in conjunction with the decedent * * *.

The Regulations are in accord with prior decisions of this Court. The Court has held that a "right" or "power" exercisable by the decedent only in conjunction with a beneficiary having a substantial interest adverse to the exercise of the power (*Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85), or by the decedent as trustee only in conjunction with co-trustees (*United States* v. *O'Malley*, 383 U.S. 627), is nevertheless such a power or right as to bring the

property transferred within the gross estate of the decedent. In the first case, the factual constraints upon the power or right reserved to the decedent are obvious. They are indeed so substantial that the Court in *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 346, had held that the right to revoke under such limitations was without significance for the practical purposes of the tax. But under a later and different statutory provision, the Court held otherwise in the *City Bank* case. In the *O'Malley* case, in which the decedent could exercise the right only in his capacity as trustee, and only in conjunction with co-trustees, the factual and legal restraints upon the decedent and upon his co-trustees were greater and more striking than the restraints that the Court discusses in this case (Op. 12-15, 17-18). Here the decedent reserved the right to vote the transferred stock in his individual capacity, that is, to vote as he pleased and without any restriction or restraint except such as might be implied by law if he became a director of the corporations. The Court's apparent conclusion that the right of the decedent must be (Op. 18) entirely "unconstrained" in all events is inconsistent with the statute, the regulations, and its prior decisions. See particularly, *Commissioner* v. *Estate of Church*, 335 U.S. 632, 645.

The great majority of estate tax cases under Sections 2036 and 2038 involve transfers in trust. But the statute covers transfers in trust "or otherwise." The corporate mechanism is highly flexible and, with the exercise of imagination and skill, can be employed to achieve results more commonly obtained by the use of the trust device. For example, a decedent who has

transferred the common stock of a corporation but who has created and retained an issue of cumulative preferred stock, reinforced by an appropriate sinking fund provision calling for periodic retirement of the preferred stock, will have effectively retained for his life the income from the corporate property if he has made a roughly accurate estimate of his expectancy and of corporate income. Making appropriate allowance for a margin of error, he can be confident that the income from the corporate property will be payable to him for a "period which does not in fact end before his death." A decedent who, as here, retains during his life the voting control of a corporation—whether control be considered as a question of fact or of legal definition—will have effectively retained control of the flow of income therefrom even though he may have done so, not alone, but in conjunction with others who, subject ultimately to his pleasure, hold positions as directors. The fiduciary and other restraints upon him and them are no more rigorous or exacting than the similar restraints upon the co-trustees in *O'Malley*.

To dismiss the opinion in *Commissioner* v. *Sunnen*, 333 U.S. 591, as "a personal income tax case" (Op. 14, fn. 14) diminishes its accuracy and relevance as a description and analysis of the significance of corporate control. Furthermore, we would here reiterate that Byrum reserved control of the transferred stock in a nonfiduciary capacity.[2] It has long been recog-

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[2] See Restatement of Trusts 2d, § 185, comment c., p. 396, as follows:

> It is a question of interpretation whether a power reserved to the settlor to control the trustee in disposing of

nized that in these circumstances the grantor of a trust should be treated as the owner of the transferred stock for income tax purposes.[3] See *Helvering* v. *Fuller*, 310 U.S. 69, 72, 76; Internal Revenue Code of 1954, Sec. 675; Treasury Regulations on Income Tax (1954 Code), § 1.675-1. It seems inconceivable that Congress intended to draw a distinction between income and estate taxes in this regard.

The Court's decision will put a high premium upon the use of the corporate mechanism to achieve and retain controls (be they designated rights or powers) that have heretofore brought liability for estate taxes

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and making investments is a power for the benefit of the beneficiaries of the trust generally or for the benefit of the settlor alone or for the benefit of both the beneficiaries generally and of the settlor. A circumstance tending to show that it was for the benefit of the settlor alone would be that he had retained one-half of the shares of a corporation of which he had placed the other half in the trust, because that would tend to show that his purpose was to protect his interest in the shares which he had retained.

[3] It is significant that the accumulated earnings tax, imposed by Sections 531-535 of the Internal Revenue Code of 1954 upon corporations accumulating earnings beyond the reasonable needs of the business in order to avoid the income tax with respect to their stockholders, rarely applies to publicly held corporations; and the fact that control is held by a single stockholder or group of stockholders is relevant in determining whether there has been a motive of tax avoidance. Thus, the code and the courts generally recognize that the principal stockholder of a close corporation may be expected to control the dividend policy of the corporation. See, *e.g.*, *Golconda Mining Corp.* v. *Commissioner*, 58 T.C. No. 13.

if achieved through the mechanism of a trust. It is difficult to believe that the Congress intended such rewards for the utilization of corporate sophistication and skill.

2. It is not necessary that there be income from the transferred property to bring Section 2036(a) into operation.

The Court (Op. 14-17) discusses the vicissitudes of corporate life and the many factors that may make income unavailable—the "economic * * * constraints" referred to (Op. 19) in the concluding paragraph of Part I of its opinion. But there is never complete assurance that securities transferred in trust will be productive of income, and the operation of Section 2036(a) is not dependent upon the fact of income. In a case such as *O'Malley*, the transferor with a right to add income to principal may, if there is income, have to take into account many financial and economic factors in deciding whether to retain income in the trust or to distribute it. But the statute operates if the transferor retains the right to decide with respect to such income as there may be, and whether decision is easy or difficult, completely free or constrained by investment needs or opportunities. The statute operates because the transferor retained for himself during his life, and did not give to others, the right or power to make the decisions with respect to the treatment of income, whether he anticipated that those decisions should be based upon purely personal considerations, or perhaps a delicate amalgam of personal and economic or financial considerations. The Court's dis-

cussion of the uncertainties of income, and of the factors influencing its use, does not, therefore, touch upon the factors made significant by the statute.

3. The Congress has defined the type of conduct that results in estate tax consequences, and has done so in a fashion different from that which prevailed under the Revenue Act of 1921.

The Court refers (Op. 7-8) to *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, as indicating that a settlor's retention of broad powers of management does not necessarily subject an *inter vivos* trust to the federal estate tax. The Court also refers (Op. 9) to possible reliance upon that decision, and indicates (Op. 10) that Congress rather than the Court is equipped to act when a principle of taxation requires re-examination.

The Congress did re-examine the principles upon which *Reinecke* v. *Northern Trust Co.* was decided. It did so under dramatic circumstances in a single day by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and perfected its re-examination by Section 803(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, 279, all as set forth in *Hassett* v. *Welch*, 303 U.S. 303, 307-311. The result of that re-examination was what is now Section 2036(a). As this Court has at least twice stated, the result of that re-examination was the legislative abandonment of the principles upon which *Reinecke* v. *Northern Trust Co.* was decided.

Reinecke v. *Northern Trust Co.* arose under Section 402(c) of the Revenue Act of 1921, c. 136, 42

Stat. 227, 278. As the opinion of the Court clearly discloses (278 U.S. 339, 346-347), the Court held that the reserved powers of management of the trusts did not bring them into the gross estate because Section 402(c) as it then was written was construed to eliminate from the gross estate property of which the owner had made an effective transfer of title.[4]

The principles upon which *Reinecke* v. *Northern Trust Co.* was decided were long ago re-examined by the Congress and legislatively rendered obsolete. Reliance upon them would surely have been misplaced for the past forty years. Indeed this Court's decisions have not indicated that reliance upon the *status quo* of the estate tax could profitably enter into estate planning. Reliance may be an important fac-

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[4] *McCormick* v. *Burnet*, 283 U.S. 784, and *Helvering* v. *Duke*, 290 U.S. 591, to which the Court refers (Op. 8, fn. 5) as following *Reinecke* v. *Northern Trust Co.*, arose under the same statutory provision. See *Duke* v. *Commissioner*, 23 B.T.A. 1104, for a statement of the issues in that case. But *McCormick* v. *Burnet* was one of three cases decided March 2, 1931, that resulted in the vigorous and dramatic Congressional response embodied in the Joint Resolution of March 3, 1931, *supra*. See *Commissioner* v. *Estate of Church*, 335 U.S. 632, 637-640. It would be difficult to conclude that the legislative response left unchanged for the future either the result in *McCormick* v. *Burnet* or the principles of *Reinecke* v. *Northern Trust Co.* that it approved and followed. Twice subsequently, when taxpayers have invoked *Reinecke* v. *Northern Trust Co.* under an amended statute, this Court has rejected their arguments with the statement that the principles of Section 402(c) of the Revenue Act of 1921 were no longer controlling. *Porter* v. *Commissioner*, 288 U.S. 436, 442; *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, 87-88.

tor in a legal system where voluntary action is being considered. But death is inescapable, and, unless Congress has otherwise provided, the Court has usually applied death taxes effective at the time of death, at least where some element of control continued, whatever the statutory provisions at the time of a transfer. See, *e.g.*, *United States* v. *Jacobs*, 306 U.S. 363; *Porter* v. *Commissioner*, 288 U.S. 436.

4. The Court may well have foreclosed consideration of an important question not presented as involved in this case.

The decedent in this case, in addition to reserving voting power over corporations he controlled before he made the transfers in question, reserved the power to approve trust investments and reinvestments. He also reserved the right to remove the trustee and to designate another corporate trustee.

In its petition for certiorari and in its original brief the government supported its assessment of estate taxes on the basis of Byrum's continuing voting control over the corporations involved, and his veto power over disposition of those shares of stock. It did not otherwise bring into the case Byrum's control of investments generally. That issue was interjected by the brief of *Amici* in their effort to maintain that *Reinecke* v. *Northern Trust Co.* was controlling. In its reply brief, the government (pp. 2-4) made brief answer, but insisted (pp. 4-5) that that issue had no essential bearing on the case.

The issue of the significance of investment control is an important one, though not here necessarily in-

volved. The Court (Op. 8 and fn. 6, 9 *et seq.*), by its approval of *Estate of King* v. *Commissioner*, 37 T.C. 973, and similar decisions in the lower courts, has cast serious doubt on further consideration of the issue.

Every substantial investor and every investment counselor knows that one may invest for income, or for growth, or for a mixture of the two. Mutual funds, for example, are frequently designated either as income funds or as growth funds. The grantor of a trust who has retained control over investments is free to make the same choice that other investors can make, and thereby to exercise control over income available to life beneficiaries, or to seek growth available only ultimately to remaindermen. That is the same choice that the grantor in *United States* v. *O'Malley* retained, though he retained it by virtue of a different mechanism. Even if the right is given to the grantor as trustee, a broadly drawn trust instrument will leave his choice substantially unrestrained within limits that will rarely chafe.

It would be remarkable if courts were unable to know, and if the Commissioner of Internal Revenue were prohibited from knowing, what every investor and investment counselor knows. It would be particularly unfortunate if the Court has decided a question of this importance not presented in the petition for certiorari, not fully briefed, and, we believe, not necessary for decision of the case. If the Court believes that investment control is necessarily involved in this case, it would appear that decision might appropri-

ately be deferred until after there has been opportunity for complete briefing and consideration more clearly directed to that important question.

CONCLUSION

For the reasons stated, the petition for rehearing should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

CERTIFICATE

It is hereby certified that this Petition for Rehearing is presented in good faith and not for delay.

ERWIN N. GRISWOLD
Solicitor General

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* BYRUM, EXECUTRIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-308. Argued March 1, 1972—Decided June 26, 1972

Decedent transferred to an irrevocable trust for the benefit of his children (and if they died before the trust ended, their surviving children) stock in three unlisted corporations that he controlled, retaining the right to vote the transferred stock, to veto the transfer by the trustee (a bank) of any of the stock, and to remove the trustee and appoint another corporate trustee as successor. The right to vote the transferred stock, together with the vote of the stock decedent owned at the time of his death, gave him a majority vote in each of the corporations. The Commissioner of Internal Revenue determined that the transferred stock was includable in decedent's gross estate under § 2036 (a) of the Internal Revenue Code of 1954, which requires the inclusion in a decedent's gross estate of the value of any property he has transferred by *inter vivos* gift, if he retained for his lifetime "(1) the . . . enjoyment of . . . the property transferred, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall . . . enjoy . . . the income therefrom." The Commissioner claimed that decedent's right to vote the transferred shares and to veto any sale by the trustee, together with the ownership of other shares, made the transferred shares includable under § 2036 (a)(2), because decedent retained control over corporate dividend policy and, by regulating the flow of income to the trust, could shift or defer the beneficial enjoyment of trust income between the present beneficiaries and remaindermen, and under § 2036 (a)(1) because, by reason of decedent's retained control over the corporations, he had the right to continue to benefit economically from the transferred shares during his lifetime. *Held:*

Syllabus

1. Decedent did not retain the "right," within the meaning of § 2036 (a)(2), to designate who was to enjoy the trust income. Pp. 6–17.

(a) A settlor's retention of broad management powers did not necessarily subject an *inter vivos* trust to the federal estate tax. Pp. 6–10.

(b) In view of legal and business constraints applicable to the payment of dividends, especially where there are minority stockholders, decedent's right to vote a majority of the shares in these corporations did not give him a *de facto* position tantamount to the power to accumulate income in the trust. Pp. 10–17.

2. Decedent's voting control of the stock did not constitute retention of the enjoyment of the transferred stock within the meaning of § 2036 (a)(1), since the decedent had transferred irrevocably the title to the stock and right to the income therefrom. Pp. 17–22.

440 F. 2d 949, affirmed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Stewart, Marshall, and Rehnquist, JJ., joined. White, J., filed a dissenting opinion, in which Brennan and Blackmun, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 71-308

United States, Petitioner, v. Marian A. Byrum, Executrix Under the Last Will and Testament of Milliken C. Byrum. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 26, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

Decedent, Milliken C. Byrum, created in 1958 an irrevocable trust to which he transferred shares of stock in three closely held corporations. Prior to transfer, he owned at least 71% of the outstanding stock of each corporation. The beneficiaries were his children or, in the event of their death before the termination of the trust, their surviving children. The trust instrument specified that there be a corporate trustee. Byrum designated as sole trustee an independent corporation, Huntington National Bank. The trust agreement vested in the trustee broad and detailed powers with respect to the control and management of the trust property. These powers were exercisable in the trustee's sole discretion, subject to certain rights reserved by Byrum: (i) to vote the shares of unlisted stock held in the trust estate; (ii) to disapprove the sale or transfer of any trust assets, including the shares transferred to the trust; (iii) to approve investments and reinvestments; and (iv) to remove the trustee and "designate another corporate Trustee to serve as successor." Until the

youngest living child reached age 21, the trustee was authorized in its "absolute and sole discretion" to pay the income and principal of the trust to or for the benefit of the beneficiaries, "with due regard to their individual needs for education, care, maintenance and support." After the youngest child reached 21, the trust was to be divided into separate trusts for each child, to terminate when the beneficiaries reached 35. The trustee was authorized in its discretion to pay income and principal from these trusts to the beneficiaries for emergency or other "worthy needs," including education.[1]

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[1] The Trust Agreement in pertinent parts provided:

"Article IV. Irrevocable Trust.

"This Trust shall be irrevocable and Grantor reserves no rights, powers, privileges or benefits either as to the Trust estate or the control or management of the trust property, except as set forth herein.

"Article V. Powers Of The Trustee.

"The Trustee shall have and possess and may exercise at all times not only the rights, powers and authorities incident to the office or required in the discharge of this trust, or impliedly conferred upon and vested in it, but there is hereby expressly conferred upon and vested in the Trustee all the rights, powers and authorities embodied in the following paragraphs in this Article, which are shown by way of illustration but not by way of limitation:

. . . . .

"Sell. 5.02 To sell at public or private sale, to grant options to sell, to exchange, re-exchange or otherwise dispose of all or part of the property, real or personal at any time belonging to the Trust Estate, upon such terms and conditions and for such consideration as said Trustee shall determine, and to execute and deliver all instruments of sale or conveyance necessary or desirable therefor.

"Investments. 5.05 To invest any money in the Trust estate in stocks, bonds, investment trusts, common trust funds, and any other securities or property, real or personal, secured or unsecured, whether the obligations of individuals, corporations, trusts, associations, governments, expressly including shares and/or obligations of its own corporation, or otherwise, either within or outside of the State of Ohio, as the Trustee shall deem advisable, without any limitation

When he died in 1964, Byrum owned less than 50% of the common stock in two of the corporations and 59% in the third. The trust had retained the shares

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whatsoever as to character of investment under any statute or rule of law now or hereafter enacted or existing regarding trust funds or investments by fiduciaries or otherwise.

"Voting. 5.06 To vote by proxy or in person any stock or security comprising a part of the trust estate, at any meeting, except that during Grantor's lifetime, all voting rights of any stocks which are not listed on a stock exchange, shall be exercised by Grantor, and after Grantor's death, the voting rights of such stocks shall be exercised by Grantor's wife during her lifetime.

. . . . .

"Leases. 5.09 To make leases for any length of time, whether longer or shorter than the duration of this Trust, to commence at the present time or in the future; to extend any lease; to grant options to lease or to renew any lease; it being expressly understood that the Trustee may grant or enter into ninety-nine year leases renewable forever.

. . . . .

"Income Allocation. 5.13 To determine in its discretion how all receipts and disbursements, capital gains and losses, shall be charged, credited or apportioned between income and principal.

. . . . .

"Limitation. 5.15 Notwithstanding the powers of the Trustee granted in paragraphs 5.02, 5.05, 5.09 and 5.11 above, the Trustee shall not exercise any of the powers granted in said paragraphs unless (a) during Grantor's lifetime said Grantor shall approve of the action taken by the Trustee pursuant to said powers, (b) after the death of the Grantor and as long as his wife, Marian A. Byrum, shall live, said wife shall approve of the action taken by the Trustee pursuant to said powers.

. . . . .

"Article VI. Distribution Prior To Age 21.

"Until my youngest living child reaches the age of twenty-one (21) years, the Trustee shall exercise absolute and sole discretion in paying or applying income and/or principal of the Trust to or for the benefit of Grantors child or children and their issue, with due regard to their individual needs for education, care, maintenance and support and not necessarily in equal shares, per stirpes. The de-

transferred to it, with the result that Byrum had continued to have the right to vote not less than 71% of

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cision of the Trustee in the dispensing of Trust funds for such purposes shall be final and binding on all interested persons.

"Article VI. [*sic*] Division At Age 21.

. . . .

"Principal Disbursements. 6.02 If prior to attaining the age of thirty-five (35), any one of the children of Grantor shall have an emergency such as an extended illness requiring unusual medical or hospital expenses, or any other worthy need including education of such child, the Trustee is hereby authorized and empowered to pay to such child or use for his or her benefit such amounts of income and principal of the Trust as the Trustee in its sole judgment and discretion shall determine.

. . . .

"Article VIII. Removal of Trustee.

"If the Trustee, The Huntington National Bank of Columbus, Columbus, Ohio, shall at any time change its name or combine with one or more corporations under one or more diffeernt names, or if its assets and business at any time shall be purchased and absorbed by another trust company or corporation authorized by law to accept these trusts, the new or successor corporation shall be considered as the said The Huntington National Bank of Columbus, Ohio, and shall continue said Trusts and succeed to all the rights, privileges, duties and obligations herein conferred upon said The Huntington National Bank of Columbus, Ohio, Trustee.

"Grantor, prior to his death, and after the death of the Grantor, the Grantors wife, Marian A. Byrum, during her lifetime, may remove or cause the removal of The Huntington National Bank of Columbus, Ohio, or any successor Trustee, as Trustee under the Trusts and may thereupon designate another corporate Trustee to serve as successor Trustee hereunder.

"Article IX. Miscellaneous Provisions.

. . . .

"Discretion. 9.02 If in the opinion of the Trustee it shall appear that the total income of any beneficiary of any Trust fund created hereunder is insufficient for his or her proper or suitable support, care and comfort, and education and that of said beneficiary's children, the Trustee is authorized to pay to or for such beneficiary or child such additional amounts from the principal of the Trust Estate

the common stock in each of the three corporations.[2] There were minority stockholders, unrelated to Byrum, in each corporation.

Following Byrum's death, the Commissioner of Internal Revenue determined that the transferred stock was properly included within Byrum's gross estate under § 2036 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 2036 (a). That section provides for the inclusion in a decedent's gross estate of all property which the decedent has transferred by *inter vivos* transaction, if he has retained for his lifetime "(1) the possession or enjoyment of, or the right to the income from, the property" transferred, or "(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."[3] The Commissioner determined that the

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as it shall deem advisable in order to provide suitably and properly for the support, care, comfort, and education of said beneficiary and of said beneficiary's children, and the action of the Trustee in making such payment shall be binding on all persons."

[2] The actual proportions were:

	Percentage Owned by Decedent	Percentage Owned by Trust	Total Percentage Owned by Decedent and Trust
Byrum Lithographing Co., Inc.	59	12	71
Graphic Realty, Inc.	35	48	83
Bychrome Co.	42	46	88

[3] 26 U. S. C. § 2036 provides:

"(a) General rule.

"The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for

stock transferred into the trust should be included in Byrum's gross estate because of the rights reserved by him in the trust agreement. It was asserted that his right to vote the transferred shares and to veto any sale thereof by the trustee, together with the ownership of other shares, enabled Byrum to retain the "enjoyment of . . . the property," and also allowed him to determine the flow of income to the trust and thereby "designate the persons who shall . . . enjoy . . . the income."

The executrix of Byrum's estate paid an additional tax of $13,202.45, and thereafter brought this refund action in District Court. The facts not being in dispute, the court ruled for the executrix on cross motions for summary judgment, *Byrum* v. *United States*, 311 F. Supp. 892 (SD Ohio 1970). The Court of Appeals affirmed, one judge dissenting. 440 F. 2d 949 (CA6 1971). We granted the Government's petition for certiorari. 404 U. S. 937 (1971).

I.

The Government relies primarily on its claim, made under § 2036 (a)(2), that Byrum retained the right to designate the persons who shall enjoy the income from the transferred property. The argument is a complicated one. By retaining voting control over the corporations whose stock was transferred, Byrum was in a position to select the corporate directors. He could

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any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

"(1) the possession or enjoyment of, or the right to the income from, the property, or

"(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

retain this position by not selling the shares he owned and by vetoing any sale by the trustee of the transferred shares. These rights, it is said, gave him control over corporate dividend policy. By increasing, decreasing, or stopping dividends completely, it is argued that Byrum could "regulate the flow of income to the trust" and thereby shift or defer the beneficial enjoyment of trust income between the present beneficiaries and the remaindermen. The sum of this retained power is said to be tantamount to a grantor-trustee's power to accumulate income in the trust, which this Court has recognized constitutes the power to designate the persons who shall enjoy the income from transferred property.[4]

At the outset we observe that this Court has never held that trust property must be included in a settlor's gross estate solely because the settlor retained the power to manage trust assets. On the contrary, since our decision in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), it has been recognized that a settlor's retention

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[4] *United States* v. *O'Malley*, 383 U. S. 627 (1966).

It is irrelevant to this argument how many shares Byrum transferred to the trust. Had he retained in his own name more than 50% of the shares (as he did with one corporation), rather than retaining the right to vote the transferred shares, he would still have had the right to elect the board of directors and the same power to "control" the flow of dividends. Thus, the government is arguing that a majority shareholder's estate must be taxed for stock transferred to a trust if he owned at least 50% of the voting stock after the transfer or if he retained the right to vote the transferred stock and could thus vote more than 50% of the stock. It would follow also that if a settlor controlled 50% of the voting stock and similarly transferred some other class of stock for which the payment of dividends had to be authorized by the directors, his estate would also be taxed. Query: what would happen if he had the right to vote less than 50% of the voting stock but still "controlled" the corporation? See n. 10, *infra*.

of broad powers of management does not necessarily subject an *intervivos* trust to the federal estate tax.[5] Although there was no statutory analogue to § 2036 (a)(2) when *Northern Trust* was decided, several lower court decisions decided after the enactment of the predecessor of § 2036 (a)(2) have upheld the settlor's right to exercise managerial powers without incurring estate tax liability.[6] In *Estate of King* v. *Commissioner*, 37 T. C. 973 (1962), a settlor reserved the power to direct the trustee in the management and investment of trust assets. The Government argued that the settlor was thereby empowered to cause investments to be made in such a manner as to control significantly the flow of income into the trust. The Tax Court rejected this argument, and held for the taxpayer. Although the court recognized that the settlor had reserved "wide latitude in the exercise of his discretion as to the types of investments to be made," it did not find this control over the flow of income to be equivalent to the power to designate who shall enjoy the income from the transferred property.

Essentially the power retained by Byrum is the same

[5] The Court has never overturned this ruling. See *McCormick* v. *Burnet*, 283 U. S. 784 (1931); *Helvering* v. *Duke*, 290 U. S. 591 (1933) (affirmed by an equally divided Court). In *Commissioner* v. *Estate of Church*, 335 U. S. 632 (1949), and *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701 (1949), the Court invited, *sua sponte*, argument of this question, but did not reach the issue in either opinion.

[6] See, *e. g., Old Colony Trust Co.* v. *United States*, 423 F. 2d 601 (CA1 1970); *United States* v. *Powell*, 307 F. 2d 821 (CA10 1962); *Estate of Ford* v. *Commissioner*, 53 T. C. 114 (1969), aff'd, 450 F. 2d 878 (CA2 1971); *Commissioner* v. *Wilson's Estate*, 13 T. C. 869 (1949) (*en banc*), aff'd, 187 F. 2d 145 (CA3 1951); *Estate of Budd* v. *Commissioner*, 49 T. C. 468 (1968); *Estate of Pardee* v. *Commissioner*, 49 T. C. 140 (1967); *Estate of King* v. *Commissioner*, 37 T. C. 973 (1962).

managerial power retained by the settlors in *Northern Trust* and in *King*. Although neither case controls this one—*Northern Trust*, because it was not decided under § 2036 (a)(2) or a predecessor; and *King*, because it is a lower court opinion—the existence of such precedents carries weight.[7] The holding of *Northern Trust*, that the settlor of a trust may retain broad powers of management without adverse estate tax consequences, may have been relied upon in the drafting of hundreds of *inter vivos* trusts.[8] The modification of this principle now sought by the Government could have a seriously adverse impact, especially upon settlors (and their estates) who happen to have been "controlling" stockholders of a closely held corporation. Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the

[7] The dissenting opinion attempts to distinguish the cases, holding that a settlor-trustee's retained powers of management do not bring adverse estate tax consequences, on the ground that management of trust assets is not the same as the power retained by Byrum because a settlor-trustee is bound by a fiduciary duty to treat the life tenant beneficiaries and remainderman as the trust instrument specifies. But the argument that in the reserved-power-of-management cases there was "a judicially enforceable strict standard capable of invocation by the trust beneficiaries by reference to the terms of the trust agreement," *post*, at —, ignores the fact that trust agreements may and often do provide for the widest investment discretion.

[8] Assuming, *arguendo*, that MR. JUSTICE WHITE is correct in suggesting that in 1958, when this trust instrument was drawn, the estate-tax consequences of the settlor's retained powers of management were less certain than they are now, this Court's failure to overrule *Northern Trust*, plus the existence of recent cases such as *King* and the cases cited in n. 6, have undoubtedly been relied on by the draftsmen of more recent trusts with considerable justification. Our concern as to this point is not so much with whether Byrum properly relied on the precedents, but with the probability that others did rely thereon in good faith.

departure could have potentially far-reaching consequences. When a principle of taxation requires reexamination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences. When courts readily undertake such tasks, taxpayers may not rely with assurance on what appear to be established rules lest they be subsequently overturned. Legislative enactments, on the other hand, although not always free from ambiguity, at least afford the taxpayers advance warning.

The Government argues, however, that our opinion in *United States* v. *O'Malley,* 383 U. S. 627 (1966), compels the inclusion in Byrum's estate of the stock owned by the trust. In *O'Malley,* the settlor of an *inter vivos* trust named himself as one of the three trustees. The trust agreement authorized the trustees to pay income to the life beneficiary or to accumulate it as a part of the principal of the trust in their "sole discretion." The agreement further provided that net income retained by the trustees, and not distributed in any calendar year, "shall become a part of the principal of the trust estate." The Court characterized the effect of the trust as follows:

> "Here Fabrice [the settlor] was empowered, with the other trustees, to distribute the trust income to the income beneficiaries or to accumulate it and add it to the principal, thereby denying to the beneficiaries the privilege of immediate enjoyment and conditioning their eventual enjoyment upon surviving the termination of the trust." 383 U. S., at 631.

As the retention of this legal right by the settlor, acting as a trustee "in conjunction" with the other trustees,

came squarely within the language and intent of the predecessor of § 2036 (a)(2), the taxpayer conceded that the original assets transferred into the trust were includable in the decedent's gross estate. 383 U. S., at 632. The issue before the Court was whether the accumulated income, which had been added to the principal pursuant to the reservation of right in that respect, was also includable in decedent's estate for tax purposes. The Court held that it was.

In our view, and for the purposes of this case, *O'Malley* adds nothing to the statute itself. The facts in that case were clearly within the ambit of what is now § 2036 (a)(2). That section requires that the settlor must have "retained for his life . . . the *right* . . . to designate the persons who shall possess or enjoy the property or the income therefrom." O'Malley was covered precisely by the statute for two reasons: (1) there the settlor had reserved a legal right, set forth in the trust instrument; and (2) this right expressly authorized the settlor, "in conjunction" with others, to accumulate income and thereby "to designate" the persons to enjoy it.

It must be conceded that Byrum reserved no such "right" in the trust instrument or otherwise. The term "right," certainly when used in a tax statute, must be given its normal and customary meaning. It connotes an ascertainable and legally enforceable power, such as that involved in *O'Malley*.[9] Here, the right ascribed to Byrum was the power to use his majority position

[9] Although MR. JUSTICE WHITE's dissent argues that the use of the word "power" in *O'Malley* implies that the Court's concern was with practical reality rather than legal form, an examination of that opinion does not indicate that the term was used other than in the sense of *legally* empowered. At any rate, the "power" was a right reserved to the settlor in the trust instrument itself.

and influence over the corporate directors to "regulate the flow of dividends" to the trust. That "right" was neither ascertainable nor legally enforceable and hence was not a right in any normal sense of that term.[10]

Byrum did retain the legal right to vote shares held by the trust and to veto investments and reinvestments. But the corporate trustee alone, not Byrum, had the right to pay out or withhold income and thereby to designate who among the beneficiaries enjoyed such income. Whatever power Byrum may have possessed, with respect to the flow of income into the trust, was derived not from an enforceable legal right specified in the trust instrument, but from the fact that he could elect a majority of the directors of the three corporations. The power to elect the directors conferred no legal right to command them to pay or not to pay dividends. A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests.[11] Moreover,

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[10] The "control" rationale, urged by the Government and adopted by the dissenting opinion, would create a standard—not specified in the statute—so vague and amorphous as to be impossible of ascertainment in many instances. See n. 13, *infra*. Neither the Government nor the dissent sheds light on the absence of an ascertainable standard. The Government speaks vaguely of drawing the line between "an unimportant minority interest" (whatever that may be) and "voting control." The dissenting opinion does not address this problem at all. See Comment, Sale of Control Stock and the Brokers' Transaction Exemption—Before and After the Wheat Report, 49 Tex. L. Rev. 475, 479–481 (1971).

[11] Such a fiduciary relationship would exist in almost every if not every State. Ohio, from which this case arises, is no exception:

"[I]f the majority undertakes, either directly or indirectly, through the directors, to conduct, manage, or direct the corporation's affairs, they must do so in good faith, and with an eye single to the

the directors also have a fiduciary duty to promote the interests of the corporation.[12] However great Byrum's influence may have been with the corporate directors, their responsibilities were to all stockholders and were enforceable according to legal standards entirely unrelated to the needs of the trust or to Byrum's desires with respect thereto.

The Government seeks to equate the *de facto* position of a controlling stockholder with the legally enforceable "right" specified by the statute. Retention of corporate control (through the right to vote the shares) is said to be "tantamount to the power to accumulate income" in the trust which resulted in estate tax consequences in *O'Malley*. The Government goes on to assert that "through exercise of that retained power [Byrum] could increase or decrease corporate dividends, and thereby shift or defer the beneficial enjoyment of the trust."[13] This approach seems to us not only to

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best interests of the corporation. It is clear that the interests of the majority are not always identical with the interests of all the shareholders. The obligation of the majority or of the dominant group of shareholders acting for, or through the corporation, is fiduciary in nature. A court of equity will grant appropriate relief where the majority or dominant group of shareholders act in their own interest or in the interest of others so as to oppress the minority or commit a fraud upon their rights." 13 Ohio Jurisprudence 2d, § 662, at 90-91 (footnotes omitted).

See *Overfield* v. *Pennroad Corp.*, 42 F. Supp. 586 (ED Pa. 1941); rev'd on other grounds, 146 F. 2d 889 (CA3 1944).

[12] "The directors of the corporation represent the corporation, not just one segment of it, but all of it. The fiduciary nature of the directors' obligation requires that, in the management of the corporation's affairs, they do not presume to play favorites among the shareholders or among the classes of shareholders." 12 Ohio Jurisprudence, 2d, § 497, at 618.

[13] The Government uses the terms "control" and "controlling stockholder" as if they were words of art with a fixed and ascertainable

depart from the specific statutory language,[14] but also to misconceive the realities of corporate life.

There is no reason to suppose that the three corporations controlled by Byrum were other than typical small

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meaning. In fact, the concept of "control" is a nebulous one. Although in this case Byrum possessed "voting control" of the three corporations (in view of his being able to vote more than 50% of the stock in each), the concept is too variable and imprecise to constitute the basis *per se* for imposing tax liability under § 2036 (a). Under most circumstances, a stockholder who has the right to vote more than 50% of the voting shares of a corporation "controls it" in the sense that he may elect the board of directors. But such a stockholder would not control, under the laws of most States, certain corporate transactions such as mergers and sales of assets. Moreover, control—in terms of effective power to elect the Board under normal circumstances—may exist where there is a right to vote far less than 50% of the shares. This will vary with the size of the corporation, the number of shareholders and the concentration (or lack of it) of ownership. See generally 2 L. Loss., Securities Regulation, 770–783 (1961). Securities law practitioners recognize that possessing 10% or more of voting power is one of the factors on which the Securities and Exchange Commission relies as an indicia of control. SEC, Disclosure to Investors—The Wheat Report, 245–247 (1969).

[14] In advocating this *de facto* approach, the Government relies on our opinion in *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948). *Sunnen* was a personal income tax case in which the Court found the taxpayer had made an assignment of income. The reasoning relied on the *de facto* power of a controlling shareholder to regulate corporate business for his personal objectives. This case is an estate tax case, not an income tax case. Moreover, unlike assignment of income cases, in which the issue is who has the power over income, this case concerns a statute written in terms of the "right" to designate the recipient of income. The use of the term "right" implies that restraints on the exercise of power are to be recognized and that such restraints deprive the person exercising the power of a "right" to do so.

businesses. The customary vicissitudes of such enterprises—bad years; product obsolescence; new competition; disastrous litigation; new, inhibiting Government regulations; even bankruptcy—prevent any certainty or predictability as to earnings or dividends. There is no assurance that a small corporation will have a flow of net earnings or that income earned will in fact be available for dividends. Thus, Byrum's alleged *de facto* "power to control the flow of dividends" to the trust was subject to business and economic variables over which he had little or no control.

Even where there are corporate earnings, the legal power to declare dividends is vested solely in the corporate board. In making decisions with respect to dividends, the board must consider a number of factors. It must balance the expectation of stockholders to reasonable dividends when earned against corporate needs for retention of earnings. The first responsibility of the board is to safeguard corporate financial viability for the long term. This means, among other things, the retention of sufficient earnings to assure adequate working capital as well as resources for retirement of debt, for replacement and modernization of plant and equipment, and for growth and expansion. The nature of a corporation's business, as well as the policies and long range plans of management, are also relevant to dividend payment decisions.[15] Directors of a closely-held, small

[15] The spectrum of types of corporation businesses, and of permissible policies with respect to the retention of earnings, is broad indeed. It ranges from the public utility with relatively assured and stable income to the new and speculative corporation engaged in a cyclical business or organized to exploit a new patent or unproved technology. Some corporations pay no dividends at all, as they are organized merely to hold static assets for prolonged periods

corporation must bear in mind the relatively limited access of such an enterprise to capital markets. This may require a more conservative policy with respect to dividends than would be expected of an established corporation with securities listed on national exchanges.[16]

Nor do small corporations have the flexibility or the opportunity available to national concerns in the utilization of retained earnings. When earnings are substantial, a decision not to pay dividends may result only in the accumulation of surplus rather than growth through internal or external expansion. The accumulated earnings may result in the imposition of a penalty tax.[17]

These various economic considerations are ignored at the directors' peril. Although vested with broad discretion in determining whether, when, and what amount of dividends shall be paid, that discretion is subject to legal restraints. If, in obedience to the will of the majority stockholder, corporate directors disregard the interests of shareholders by accumulating earnings to an unreasonable extent, they are vulnerable to a derivative

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(*e. g.*, land, mineral resources, and the like). Corporations which emphasize growth tend to low dividend payments, whereas mature corporations may pursue generous dividend policies.

[16] *Thomas* v. *Matthews*, 94 Ohio St. 32, 55–56, 113 N. E. 669 (1916):

"[I]t is the duty of the directors, in determining the amount of net earnings available for the payment of dividends, to take into account the needs of the company in its business and sums necessary in the operation of its business until the income from further operations is available, the amount of its debts, the necessity or advisability of paying its debts or at least reducing them within the limits of the company's credit, the preservation of its capital stock as represented in the assets of the company as a fund for the protection of its creditors and the character of its surplus assets, whether cash, credits or merchandise."

[17] Internal Revenue Code of 1954, Subc. G, pt. I, §§ 531–537, 26 U. S. C. §§ 531–537.

suit.[18] They are similarly vulnerable if they make an unlawful payment of dividends in the absence of net earnings or available surplus,[19] or if they fail to exercise the requisite degree of care in discharging their duty to act only in the best interest of the corporation and its stockholders.

Byrum was similarly inhibited by a fiduciary duty from abusing his position as majority shareholder for personal or family advantage to the detriment of the corporation or other stockholders. There were a substantial number of minority stockholders in these corporations who were unrelated to Byrum.[20] Had Byrum and the directors violated their duties, the minority shareholders would have had a cause of action under Ohio

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[18] Had Byrum caused the Board to follow a dividend policy, designed to minimize or cut off income to the trust, which resulted in the imposition of the penalty for accumulated earnings not distributed to shareholders, there might be substantial grounds for a derivative suit. A derivative suit also would have been a possibility had dividends been paid imprudently to increase the trust's income at the expense of corporate liquidity. Minority shareholders in Ohio may bring derivative suits under Ohio R. Civ. P. 23.1.

[19] In most States, the power to declare dividends is vested solely in the directors. 11 Fletcher Cyclopedia Corporations, c. 58, § 5320. Ohio is no exception, and it limits the authority of directors to pay dividends depending on available corporate surplus. 17 Page's Ohio Code Ann. § 1701.33. Although liability generally exists irrespective of a statute, nearly all States have statutes regulating the liability of directors who participate in the payment of improper dividends. 12 Fletcher Cyclopedia Corporations, c. 58, § 5432. Again, Ohio is no exception. 17 Page's Ohio Rev. Code Ann. § 1701.95.

[20] Appendix, 30–32. In Byrum Lithographing Co., Inc., none of the other 11 stockholders appears to be related by name to Byrum. In Bychrome Co. five of the eight stockholders appear to be unrelated to the Byrums; and in Graphic Realty Co. 11 of the 14 stockholders appear to be unrelated.

law.[21] The Huntington National Bank, as trustee, was one of the minority stockholders, and it had both the right and the duty to hold Byrum responsible for any wrongful or negligent action as a controlling stockholder or as a director of the corporations.[22] Although Byrum had reserved the right to remove the trustee, he would have been imprudent to do this when confronted by the trustee's complaint against his conduct. A successor trustee would succeed to the rights of the one removed.

We conclude that Byrum did not have an unconstrained *de facto* power to regulate the flow of dividends to the trust, much less the "right" to designate who was to enjoy the income from trust property. His ability to affect, but not control trust income, was a qualitatively different power from that of the settlor in *O'Malley*, who had a specific and enforceable right to control the income paid to the beneficiaries.[23] Even had Byrum managed to flood the trust with income, he had no way of compelling the trustee to pay it out rather than ac-

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[21] See *Wilberding* v. *Miller*, 90 Ohio St. 28, 42, 106 N. E. 665 (1914):

"An arbitrary disregard of the rights of stockholders to dividends or other improper treatment of the assets of the company will be relieved against."

[22] The trust instrument, n. 1, *supra*, explicitly granted the trustee the power "To enforce, abandon, defend against, or have adjudicated by legal proceedings, arbitration or by compromise, any claim or demand whatsoever arising out of or which may exist against the Trust Estate."

[23] The Government cites two other opinions of this Court, in addition to *O'Malley*, to support its argument. In both *Commissioner* v. *Estate of Holmes*, 326 U. S. 480 (1946), and *Lober* v. *United States*, 346 U. S. 335 (1953), the grantor reserved to himself the power to distribute to the beneficiaries the entire principal and accumulated interest of the trust at any time. This power to terminate the trust and thereby designate the beneficiaries at a time selected by the settlor, is not comparable to the powers reserved by Byrum in this case.

cumulate it. Nor could he prevent the trustee from making payments from other trust assets,[24] although admittedly there were few of these at the time of Byrum's death. We cannot assume, however, that no other assets would come into the trust from reinvestments or other gifts.[25]

We find no merit to the Government's contention that Byrum's *de facto* "control," subject as it was to the economic and legal constraints set forth above, was tantamount to the right to designate the persons who shall enjoy trust income, specified by § 2036 (a)(2).[26]

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[24] While the trustee could not acquire or dispose of investments without Byrum's approval, he was not subject to Byrum's orders. Byrum could prevent the acquisition of an asset, but he could not require the trustee to acquire any investment. Nor could he compel a sale, although he could prevent one. Thus, if there were other income-producing assets in the trust, Byrum could not compel the trustee to dispose of them.

[25] In purporting to summarize the basis of our distinction of *O'Malley*, the dissenting opinion states:

"Now the majority would have us accept the incompatible position that a settlor seeking tax exemption may keep the power of income allocation by rendering the trust dependent on an income flow he controls because the general fiduciary obligations of a director are sufficient to eliminate the power to designate within the meaning of § 2036 (a)(2)." *Post*, at —.

This statement, which assumes the critical and ultimate conclusion, incorrectly states the position of the Court. We do not hold that a settlor "may keep the power of income allocation" in the way MR. JUSTICE WHITE sets out; we hold, for the reasons stated in this opinion, that this settlor did not retain the power to allocate income within the meaning of the statute.

[26] The dissenting opinion's view of the business world will come as a surprise to many. The dissent states:

"Thus by declaring or not declaring dividends in the controlled corporations Byrum was able to open or close the spigot, through which the income flowed to the trust's life tenant." *Post*, at —.

This appears to assume that all corporations, including the small family type involved in this case, have a regular and dependable

II

The Government asserts an alternative ground for including the shares transferred to the trust within Byrum's gross estate. It argues that by retaining control, Byrum guaranteed himself continued employment and remuneration, as well as the right to determine whether and when the corporations would be liquidated or merged. Byrum is thus said to have retained "the enjoyment of . . . the property" making it includable within his gross estate under § 2036 (a)(1). The Government concedes that the retention of the voting rights of an "unimportant minority interest" would not require inclusion of the transferred shares under § 2036 (a)(1). It argues, however, "where the cumulative effect of the retained powers and the rights flowing from the shares not placed in trust leaves the grantor in control of a close corporation and assures control

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flow of earnings available for dividends, and that if there is a controlling stockholder he simply turn the "spigot" on or off as dividends may be desired. For the reasons set forth in this opinion, no such dream world exists in the life of many corporations. But whatever the situation may be generally, the fallacy in the dissenting opinion's position here is that the record simply does not support it. This case was decided on a motion for summary judgment. The record does not disclose anything wtih respect to the earnings or financial conditions of these corporations. We simply do not know whether there were any earnings for the years in question, whether there was an earned surplus in any of the corporations, or whether—if some earnings be assumed—they were adequate in light of other corporate needs to justify dividend payments. Nor can we infer from the increase in dividend payments in the year following Byrum's death that higher dividends could have been paid previously. The increase could be explained as easily by insurance held by the corporations on Byrum's life.

for his lifetime, he has retained the 'enjoyment' of the transferred stock." [27]

It is well settled that the terms "enjoy" and "enjoyment," as used in various estate tax statutes, "are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates." *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, 486 (1946).[28] For example, in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339 (1929), in which the critical inquiry was whether the decedent had created a trust "intended to take effect in possession or enjoyment at or after his death," [29] the Court held that reserved powers of management of trust assets, similar to Byrum's power over the three corporations, did not subject an *inter vivos*

[27] At one point MR. JUSTICE WHITE seems to imply that Byrum also retained the enjoyment of the right to the income from the transferred shares:

"When Byrum closed the spigot by deferring dividends of the controlled corporations, *thereby perpetuating his own 'enjoyment' of these funds,* he also in effect transferred income from these life tenants to the remaindermen." (Emphasis added.) *Post,* at —.

But, of course, even if dividends were deferred, the funds remained in the corporation; Byrum could not use them himself.

[28] See 26 CFR § 20.2036-1 (b) (2):

"The 'use, possession, right to the income, or other enjoyment of the transferred property' is considered as having been retained by or reserved to the decedent to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit."

Although MR. JUSTICE WHITE questions the Court's failure to interpret "possession or enjoyment" with "extreme literalness," *post,* at — n. 3, apparently the Commissioner does not do so either. Reflection on the expansive nature of those words, particularly "enjoyment," will demonstrate why interpreting them with "extreme literalness" is an impossibility.

[29] *Northern Trust* was decided under th Revenue Act of 1921, c. 136, § 402 (c), 42 Stat. 278.

trust to the federal estate tax. In determining whether the settlor had retained the enjoyment of the transferred property, the Court said:

> "Nor did the reserve powers of management of the trusts give to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gifts *inter vivos* not subject to the tax." 278 U. S., at 346–347.

The cases cited by the Government reveal that the terms "possession and enjoyment," used in § 2036 (a)(1), were used to deal with situations in which the owner of property divested himself of title but retained an income interest or, in the case of real property, the lifetime use of the property. Mr. Justice Black's opinion for the Court in *Commissioner* v. *Estate of Church,* 335 U. S. 632 (1949), traces the history of the concept. In none of the cases cited by the Government has a court held that a person has retained possession or enjoyment of the property if he has transferred title irrevocably, made complete delivery of the property and relinquished the right to income where the property is income producing.[30]

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[30] *Helvering* v. *Hallock,* 309 U. S. 106 (1940); *Commissioner* v. *Estate of Church,* 335 U. S. 632 (1949); *Lober* v. *United States,* 346 U. S. 335 (1953); *United States* v. *Estate of Grace,* 395 U. S. 316 (1969); *Estate of McNichol* v. *Commissioner,* 265 F. 2d 667 (CA3),

The Government cites only one case, *Estate of Holland* v. *Commissioner*, 1 T. C. 564 (1943),[31] in which a decedent had retained the right to vote transferred shares of stock and in which the stock was included within the decedent's gross estate. In that case, it was not the mere power to vote the stock, giving the decedent control of the corporation, which caused the Tax Court to include the shares. The court held that "on an inclusive view of the whole arrangement, this withholding of the income until decedent's death, coupled with the retention of the certificates under the pledge and the reservation of the right to vote the stock and to designate company officers" subjects the stock to inclusion within the gross estate. *Id.*, at 565. The settlor in *Holland* retained a considerably greater interest than Byrum retained, including an income interest.[32]

As the Government concedes, the mere retention of the right-to-vote shares does not constitute the type of "enjoyment" in the property itself contemplated by § 2036 (a)(1). In addition to being against the weight

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cert. denied, 361 U. S. 829 (1959); *Guynn* v. *United States*, 437 F. 2d 1148 (CA4 1971). In all of these cases, as in *Church*, the grantor retained either title or an income interest or the right to use real property for his lifetime.

Despite MR. JUSTICE WHITE's suggestion *post*, at —, we have not "ignored the plain language of the statute which proscribes 'enjoyment' as well as 'possession or the right to income.'" Rather, the cases we have cited clearly establish that the terms "possession" and "enjoyment" have never been used as the dissent argues.

[31] The cited opinion supplemented an earlier opinion of the Board of Tax Appeals in the same case, 47 B. T. A. 807 (1942).

[32] A more analogous case is *Yeazel* v. *Coyle*, 68-1 U. S. T. C. ¶ 12,524 (ND Ill. 1968), in which a settlor-trustee, who transferred 60% of the shares of a wholly-owned corporation to a trust, was found not to have retained the enjoyment of the property for her lifetime.

of precedent, the Government's argument that Byrum *retained* "enjoyment" within the meaning of § 2036 (a)(1) is conceptually unsound. This argument implies, as it must under the express language of § 2036 (a)(1), that Byrum "retained for his life . . . the possession or enjoyment" of the "*property*" transferred to the trust or the "*income*" therefore. The only property he transferred was corporate stock. He did not transfer "control" (in the sense used by the Government) as the trust never owned as much as 50% of the stock of any corporation. Byrum never divested himself of control, as he was able to vote a majority of the shares by virtue of what he owned and the right to vote those placed in the trust. Indeed, at the time of his death he still owned a majority of the shares in the largest of the corporations and probably would have exercised control of the other two by virtue of being a large stockholder in each.[33] The statutory language plainly contemplates retention of an attribute of the property transferred—such as a right to income, use of the property itself, or a power of appointment with respect either to income or principal.[34]

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[33] The Government, for the reasons discussed in n. 5, *supra*, makes no distinction between retention of control by virute of owning 50% or more of the voting shares and such retention by a combination of stock owned and that with respect to which the right to vote was retained.

[34] The interpretation given § 2036 (a) by the Government and by Mr. Justice White's dissenting opinion would seriously disadvantage settlors in a control posture. If the settlor remained a controlling stockholder, any transfer of stock would be taxable to his estate. See n. 4, *supra*. The typical closely held corportion is small, has a checkered earning record, and has no market for its shares. Yet its shares often have substantial asset value. To prevent the crippling liquidity problem that would result from the imposition of estate taxes on such shares, the controlling shareholder's estate planning often includes an irrevocable trust. The

Even if Byrum had transferred a majority of the stock, but had retained voting control, he would not have retained "substantial present economic benefits." The Government points to the retention of two "benefits." The first of these, the power to liquidate or merge, is not a *present* benefit; rather, it is a speculative and contingent benefit which may or may not be realized. Nor is the probability of continued employment and compensation the substantial "enjoyment of . . . [the transferred] property" within the meaning of the statute. The dominant stockholder in a closely held corporation, if he is active and productive, is likely to hold a senior position and to enjoy the advantage of a significant voice in his own compensation. These are inevitable facts of the free enterprise system, but the influence and capability of a controlling stockholder to favor himself are not without constraints. Where there are minority stockholders, as in this case, directors may be held accountable if their employment, compensation and retention of officers violates their duty to act reasonably in the best interest of the corporation and all of its stockholders.[35] Moreover, this duty is policed, *albeit* indirectly, by the Internal Revenue Service, which disallows the deduction of unreasonable compensation paid to a corporate executive as a business

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Government and the dissenting opinion would deny to controlling shareholders the privilege of using this generally acceptable method of estate planning without adverse tax consequences. Yet a settlor whose wealth consisted of listed securities of corporations he did not control would be permitted the tax advantage of the irrevocable trust even though his more marketable assets present a far less serious liquidity problem. The language of the statute does not support such a result and we cannot believe Congress intended it to have such discriminatory and far-reaching impact.

[35] Directors of Ohio corporations have been held liable for payment of excessive compensation. *Berkwitz* v. *Humphrey*, 163 F. Supp. 78 (ND Ohio 1958).

expense.[36] We conclude that Byrum's retention of voting control was not the retention of the enjoyment of the transferred property within the meaning of the statute.

For the reasons set forth above, we hold that this case was correctly decided by the Court of Appeals and accordingly the judgment is

Affirmed.

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[36] 26 U. S. C. § 162 (a)(1) permits corporations to deduct "reasonable" compensation as business expenses. If the Internal Revenue Service determines that compensation exceeds the bounds of reason, it will not permit a deduction. See, *e. g., Botany Worsted Mills* v. *United States,* 278 U. S. 282 (1929).

Moreover, there is nothing in the record of this case with respect to Byrum's compensation. There is no showing that his control of these corporations gave him an "enjoyment" with respect to compensation that he would not have had upon rendering similar services without owning any stock.

SUPREME COURT OF THE UNITED STATES

No. 71-308

United States, Petitioner, *v.* Marian A. Byrum, Executrix Under the Last Will and Testament of Milliken C. Byrum.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 26, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

I think the majority is wrong in all substantial respects.

I

The tax code commands the payment of an estate tax on transfers effective in name and form during life if the now deceased settlor retained during his life either (1) "the possession or enjoyment of" the property transferred or (2) the right to designate the persons who would enjoy the transferred property or the income therefrom. 26 U. S. C. §§ 2036 (a)(1) and (2). Our cases explicate this congressional directive to mean that if one wishes to avoid a tax at death he must be self-abnegating enough to totally surrender his property interest during life.

> "[A]n estate tax cannot be avoided by any trust transfer except by a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property." *Commissioner* v. *Estate of Church*, 335 U. S. 632, 645 (1949).

In this case the taxpayer's asserted alienation doesn't measure up to this high standard. Byrum enjoyed the continued privilege of voting the shares he "gave up" to the trust. By means of these shares he enjoyed majority control of two corporations. He used that control to retain salaried positions in both corporations. To my mind this is enjoyment of property put beyond taxation only on the pretext that it isn't enjoyed.

Byrum's lifelong enjoyment of the voting power of the trust shares contravenes § 2036 (a)(2) as well as § 2036 (a)(1) because it afforded him control over which trust beneficiaries—the life tenants or the remaindermen—would receive the benefit of the income earned by these shares. He secured this power by making the trust for all intents and purposes exclusively dependent on shares it could not sell in corporations he controlled.[1] Thus by instructing the directors he elected in the controlled corporations that he thought dividends should or should not be declared Byrum was able to open or close the spigot through which income flowed to the trust's life tenants. When Byrum closed the spigot by deferring dividends of the controlled corporations, thereby perpetuating his own "enjoyment" of these funds, he also in effect transferred income from the life tenants to the remaindermen whose share values were swollen by the retained income. The extent to which such income transfers can be effected is suggested by the pay-out record of the corporations here in question, as reflected in the trust's accounts. Over the first five years of its existence on shares later valued by the Internal Revenue Service at $89,000, the trust received only a *total* of $339 in

[1] The trust held $89,000 worth of stock in Byrum controlled corporations and only one other asset; three Series E United States Savings Bonds worth a total of $300 at maturity. See "Yearly List of [Trust] Assets," at App., p. 45. Consequently I do not accord much weight to the majority's point that Byrum could not prevent the trustee from making payments "from other trust assets."

dividends. In the sixth year, Byrum died. The corporations raised their dividend rate from 10¢ a share to $2.00 per share and paid $1,498 into the trust. See "Income Cash Ledger," App., pp. 41–42.

Byrum's control over the flow of trust income renders his estate scheme repugnant to § 2036 (a)(2) as well as § 2036 (a)(1).

To me it is thus clear that Byrum's shares were not truly, totally, "absolutely, unequivocally" alienated during his life. When it is apparent that if tolerated Byrum's scheme will open a gaping hole in the estate tax laws, on what basis does the majority nonetheless conclude that Byrum should have his enjoyment, his control, and his estate free from taxes?

II

I can find nothing in the majority's three arguments purporting to deal with § 2036 (a)(1), which might justify the conclusion that Byrum did not "enjoy" a benefit from the shares his estate now asserts are immune from taxation.

1. The majority says that in *Reinecke* v. *Northern Trust*, 278 U. S. 339 (1929), "the Court held that reserved powers of management of trust assets, similar to Byrum's power over the three corporations, did not subject an *inter vivos* trust to the federal estate tax." This reading of *Northern Trust* is not warranted by the one paragraph in that antique opinion on the point for which it is now cited, see 278 U. S. 339, 346–347, nor by the circumstances of that case. No one has ever suggested that Adolphus Bartlett, the settlor in *Northern Trust*, used or could have used the voting power of the shares he transferred to a trust to control or indeed exercise any significant influence in any company. A mere glance at the nature of these securities transferred by Mr. Bartlett (1,000 shares of the Northern Trust Co., 784 shares of the

Commonwealth Edison Co., 300 shares of the Illinois Central R. Co., 300 shares of the Illinois R. Co., 200 shares of the Chicago and North Western R. Co., etc.)[2] shatters any theory which might lead one to believe that the Court in *Northern Trust* was concerned with anything like the transactions in this case. On what basis then does the majority say that *Northern Trust* involved a decision on facts "similar to Byrum's power over the three corporations?" And on what basis does it say that the Government's position that Byrum's use of trust shares to retain control renders those shares taxable is "against the weight of precedent?"

2. The majority implies that trust securities are taxable only if the testator retained title or the right to income from the securities until death. But this ignores the plain language of the statute which proscribes "enjoyment" as well as "possession or . . . the right to income."

3. The majority concludes with the assertion that Byrum secured no "substantial present economic benefits" from his retention of control.[3] It is suggested that con-

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[2] Transcript of the District Court record, p. 3, as filed in this Court in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929).

[3] I am constrained to note that nowhere in the statute (which the majority elsewhere in its argument would read with extreme literalness) do the words "substantial" and "present"—or suggestions to that effect—appear. The phrase "substantial present economic benefit" does appear in *Commissioner* v. *Estate of Holmes*, 326 U. S. 480, 486 (1946), from which it is quoted by the majority. But there the Court held Holmes' estate liable to taxation on the corpus of an irrevocable trust because the settlor (Holmes) had kept the power for himself as trustee to distribute or retain trust income at his discretion. The Court held that this power enabled the settler to retard or accelerate the beneficiaries' "enjoyment" at his whim. The donor had thus kept "so strong a hold over the actual and immediate enjoyment of what he [allegedly had put] beyond his own power" that he could not be said to have "divested himself of that degree of control which [a predecessor of § 2036 (a)(2)] requires in order to avoid the tax." 326 U. S., at 487. *Holmes* is thus strong precedent contrary to the

trol isn't important, that it either cannot be held by a private shareholder or that it is of so little use and relevance the taxpayer can hardly be said to have "enjoyed" it. This view of corporate life is refuted by the case law;[4] by the commentators;[5] and by every day transactions on the stock exchange where tender offers and other trades repeatedly demonstrate that the power to "control" a corporation will fetch a substantial premium.[6] Moreover, the majority's view is belied by Byrum's own conduct. He obviously valued control because he forbade the bank which served as trustee to sell the trust shares in these corporations without his—Byrum's approval, whatever their return, their prospects, their value, or the trust's needs. Trust Agreement ¶ 5.15, App., p. 27.

In sum, the majority's discourse on § 2036 (a)(1) is an unconvincing rationalization for allowing Byrum the tax free "enjoyment" of the control privileges he retained through the voting power of shares he supposedly "absolutely" and "unequivocally" gave up.

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majority's § 2036 (a)(2) argument. See also *Loper* v. *United States*, 346 U. S. 335 (1953); it certainly is not a case in which the Court intended or attempted to narrow the meaning of § 2036 (a)(1).

[4] See, *e. g., Honigman* v. *Green Giant Co.*, 208 F. Supp. 754, aff'd, 309 F. 2d 667 (CA8 1962), cert. denied, 372 U. S. 941 (1963), *Essex Universal Corp.* v. *Yates*, 305 F. 2d 572 (CA2 1962), *Perlman* v. *Feldman*, 219 F. 2d 173 (CA2 1955).

[5] "[S]hareholders in a close corporation are usually vitally interested in maintaining their proportionate control . . . ." 1 O'Neil Close Corporations § 3.39 (1971). At least since *Perlman* v. *Feldman, supra*, the academic dispute has not been over the existence of control, or its value, but rather over who is to benefit from the premium received upon its sale. See Leech, Transactions in Corporate Control, 104 U. Pa. L. Rev. 725 (1956); Hill, The Sale of Controlling Shares, 70 Harv. L. Rev. 986 (1957); Bayne, The Sale of Control Premium: The Disposition, 57 Cal. L. Rev. 615 (1969); Bayne, The Noninvestment Value of Control Stock, 45 Ind. Law J. 317 (1970).

[6] See, *e. g.*, the transactions described in Bayne, The Sale of Control Premium: The Disposition, 57 Cal. L. Rev. 615, 617 (1969).

III

I find no greater substance in the greater length of the majority's discussion of § 2036 (a)(2).

A

Approaching the § 2036 (a)(2) problem afresh one would think *United States* v. *O'Malley,* 383 U. S. 627 (1966), would control this case. In *O'Malley* the settlor "had relinquished all of his rights" to stock, but he appointed himself one of three trustees for each of the five trusts he created, and he drafted the trust agreement so that the trustees had the freedom to allocate trust income to the life tenant or to accumulate it for the remainderman "in their sole discretion." The District Court held that the value of securities transferred was includable in the settlor's gross estate under § 811 (d) of the Internal Revenue Code of 1939, the identically worded predecessor of § 2036 (a)(2), because the settlor had retained the power to allocate income between the beneficiaries without being constrained by a "definite ascertainable standard" according to which the trust would be administered. *O'Malley* v. *United States,* 220 F. Supp. 30, 33 (1963). The court noted "plaintiff's contention that the required external standard is imposed generally by the law of Illinois," but found this point to be "without merit."

> "The cases cited by plaintiff clearly set out fundamental principles of trust law: that a trust requires a named beneficiary; that the legal and equitable estates be separated; and that the trustees owe a fiduciary duty to the beneficiaries. These statements of the law are not particular to Illinois. Nor do these requirements so circumscribe the trustee's powers in an otherwise unrestricted trust so as to hold such a trust governed by an external standard

and thus excludable from the application of § 811 (c) and (d)." 220 F. Supp. 30, at 33–34.

It was another aspect of that case which brought the matter to the Court of Appeals, 340 F. 2d 930 (CA7 1964), and then here. We were asked to decide whether the lower court's holding should be extended and the accumulated income as well as the principle of the trust included in the settlor's taxable estate because the settlor had retained excessive power to designate the income beneficiaries of the shares transferred. We held that though capable of exercise only in conjunction with one other trustee, the power to allocate income without greater constraint than that imposed "is a significant power . . . of sufficient substance to be deemed the power to 'designate' within the meaning of [the predecessor of § 2036 (a)(2)]." 383 U. S., at 631.

O'Malley makes the majority's position in this case untenable. *O'Malley* establishes that a settlor serving as a trustee is barred from retaining the power to allocate trust income between a life tenant and a remainderman if he is not constrained by more than general fiduciary requirements. See also *Commissioner* v. *Estate of Holmes,* 326 U. S. 480 (1946)[7] and *Loper* v. *United States,* 346 U. S. 335 (1953). Now the majority would have us accept the incompatible position that a settlor seeking tax exemption may keep the power of income allocation by rendering the trust dependent on an income flow he controls because the general fiduciary obligations of a director are sufficient to eliminate the power to designate within the meaning of § 2036 (a)(2).[8]

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[7] See n. 3, *supra.*

[8] This incompatibility was readily perceived by the Internal Revenue Service. Shortly after *O'Malley* was handed down, it promulgated Rev. Rul. 67–54 (1967) which concluded:

"Where a decedent transfers nonvoting stock in trust and holds for the remainder of his life voting stock giving him control over the divi-

B

The majority would prop up its untenable position by suggesting that a controlling shareholder is constrained in his distribution or retention of dividends by fear of derivative suits, accumulated earnings taxes, and "various economic considerations . . . ignored at the director's peril." I do not deny the existence of such constraints, but their restraining effect on an otherwise tempting gross abuse of the corporate dividend power hardly guts the great power of a controlling director to accelerate or retard, enlarge or diminish, most dividends. The penalty taxes only take effect when accumulations exceed $100,000, 26 U. S. C. § 535 (c); Byrum was free to accumulate up to that ceiling. The threat of a derivative suit is hardly a greater deterrent to accumulation. As Cary puts it:

> "The cases in which courts have refused to require declaration of dividends or larger dividends despite the existence of current earnings or a substantial surplus or both are numerous; plaintiffs have won only a small minority of the cases. The labels are 'business judgment'; 'business purpose'; 'non-inter-

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dend policy of the corporation, he has retained, for a period which did not in fact end before his death, the right to determine the income from the nonvoting stock. If he also retains control over the disposition of the nonvoting stock, whether as trustee, by restriction upon the trustee, or alone or in conjunction with another, he has in fact made a transfer whereby he has retained for his life the right to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Since under section 20.2036-1 (b)(3) of the Estate Tax Regulations it is immaterial in what capacity a power was exercisable by the decedent, it is sufficient that the power was exercisable in the capacity of controlling stockholder. Under the facts of this case, therefore, the decedent has made a transfer with a reserved power within the meaning of section 2036 (a) of the Code."

> ference in internal affairs.' The courts have accepted the general defense of discretion, supplemented by one or more of a number of grounds put forward as reasons for not paying dividends, or larger dividends, . . ." Cary, Cases and Materials on Corporations, 4th ed. (1969), p. 1587.

and cf. *Commissioner* v. *Sunnen*, 333 U. S. 591, 609 (1948).

The ease with which excess taxes, derivative suits and economic vicissitudes alike may be circumvented or hurdled if a controlling shareholder chooses to so arrange his affairs is suggested by the pay-out record of Byrum's corporations noted above.

C

The majority proposes one other method of distinguishing *O'Malley*. Section 2036 (a)(2), it is said, speaks of the *right* to designate income beneficiaries. *O'Malley* involved the effort of a settlor to maintain a legal right to allocate income. In the instant case only the *power* to allocate income is at stake. The Government's argument is thus said to depart from "the specific statutory language"[9] and to stretch the statute beyond endurance by allocating tax according to the realities of the situation rather than by the more rigid yardstick of formal control.[10]

This argument conjures up an image of congressional care in the articulation of § 2036 (a)(2) which is entirely at odds with the circumstances of its passage. The 1931 Revenue Act which first enacted § 2036 (a)(2) in language unamended since that date, passed both houses of Congress in one day—the last day of the session.

[9] This call for literalness strongly contrasts with the majority's § 2036 (a)(2) analysis, see n. 3, *supra*.

[10] The majority's argument ignores the fact that within a wide area of discretion Byrum had the "right" to allocate corporate income to purposes other than payment of dividends, and thus the "right" to shut off income to the trust's life tenants.

There was no printed committee report. Substantial references to the bill appear in only two brief sections of the Congressional Record.[11] Under the circumstances I see no warrant for reading the words in a niggardly way.

Moreover, it appears from contemporary evidence that if the use of the word "right" was intended to have any special meaning it was to expand rather than to contract the reach of the restraint effected by the provision in which it appeared. The House Report on

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[11] The intent of Congressmen and the care with which they measured the language which the majority thinks was carefully limited is suggested by the following:

"Mr. HAWLEY. Mr. Speaker, I ask unanimous consent for the present consideration of a joint resolution (H. J. Res. 529) relating to the revenue, reported from the Committee on Ways and Means. [The resolution, § 2036 (a)(1) and (2) substantially as they appear today, was read.]

"The SPEAKER. Is there objection?

"Mr. SCHAFER of Wisconsin. Reserving the right to object, I shall object unless the gentleman explains just what the bill is.

"Mr. HAWLEY. Mr. Speaker and gentlemen, the Supreme Court yesterday handed down a decision to the effect that if a person creates a trust of his property and provides that, during his lifetime, he shall enjoy the benefits of it, and when it is distributed after his death it goes to his heirs—the Supreme Court held that it goes to his heirs free of any estate tax. . . .

"Mr. SCHAFER of Wisconsin. This is a bill to tax the rich man. I shall not object.

"Mr. COLLINS. I would like to have a little more explanation.

"Mr. SABATH. Reserving the right to object, all the resolution purports to do is to place a tax on these trusts that have been in vogue for the last few years for the purpose of evading the inheritance tax on the part of some of these rich estates?

"Mr. HAWLEY. It provides that hereafter no such method shall be used to evade the tax.

Mr. SABATH. That is good legislation." 74 Cong. Rec. (71st Cong., 3d Sess., March 3, 1931, p. 7198).

the Revenue Act of 1932 notes in relation to amendment of the predecessor of § 2036 (a)(1) that:

> "The insertion of the words 'the right to income' in place of the words 'the income' is designed to reach a case where the decedent had the right to the income, though he did not actually receive it. This is also a clarifying change." House Report No. 798, 72d Cong., 1st Sess. Reprinted in Revenue Acts 457, 491, and see the Senate Report, at p. 532, to the same effect.

I repeat the injunction of Mr. Justice Frankfurter, 25 years ago: "This is tax language and should be read in its tax sense." *United States* v. *Ogilvie Hardware Co.*, 330 U. S. 709, 721 (1947; dissenting opinion).

Lest this be considered not alone enough to refute the majority's approach, I must add that it is quite repugnant to the words and sense of our opinion in *O'Malley* to read it as though it pivoted on an interpretation of "right" rather than power. The opinion could hardly have been more explicitly concerned with the realities of a settlor's retained power rather than the theoretical legal form of the trust. Thus we said:

> "Here Fabrice [the settlor] was *empowered* . . . . This is a significant *power* . . . of sufficient substance to be deemed the *power* to 'designate' within the meaning of [the predecessor of § 2036 (a)(2)] . . . ." 383 U. S., at 631 (emphasis supplied).

And we said:

> "With the creation of the trusts he relinquished all of his rights to income except the *power* to distribute that income to the income beneficiaries or to accumulate it and hold it for the remaindermen of the trusts." 383 U. S., at 632 (emphasis supplied).

And we spoke of:

> "This *power* he exercised by accumulating and adding income to principal and this same *power* he held until the moment of his death. . . ." 383 U. S., at 634 (emphasis supplied).

Other passages could be quoted.

IV

Apparently sensing that considerations of logic, policy and recent case law point to the inclusion of Byrum's trust in his estate, the majority would blunt these considerations by invoking the principle that courts should refrain from decision detrimental to litigants who have taken a position in legitimate reliance on possibly outdated, but once established, case law. This principle is said to bring great weight to bear in Byrum's favor. I need not quarrel with the principle. I think, however, that its application in this context is inappropriate.

The majority recites these facts: This Court has never held that retention of power to manage trust assets compels inclusion of a trust in a settlor's estate. In fact, *Reinecke* v. *Northern Trust*, 278 U. S. 339 (1929), specifically held a trust arrangement immune from taxation though the settlor retained power to decide how the trust assets were to be invested. Though *Northern Trust* was decided before the passage of § 2036 (a)(2), it has been followed by "several" more recent lower court decisions. Though most of the lower court decisions provide only the most oblique reference to circumstances like those of this case, a 1962 unappealed Tax Court decision, *Estate of King* v. *Commissioner*, 37 T. C. 973 (1962), is squarely on point.

On the basis of these two authorities, a 1929 Supreme Court decision and an unreviewed 1962 Tax Court decision, the majority concludes that there exists a "gener-

ally accepted" rule that Byrum might do what he had done here. It is said that the hypothesized rule, "may" have been relied upon by "hundreds" of others; if so, its modification "could" have a serious impact, especially upon settlors who "happen" to have been controlling shareholders in closely held corporations and who "happen" to have transferred shares in those corporations to trusts while forbidding the trustee to see the shares without approval and while retaining voting rights in those shares. Therefore the rule ought not to be "modified" by this Court.

A

The argument, apparently, is that what "appear[s] to be established" should become established because it has appeared. Judges can and will properly differ on the questions of what deference to accord reliance on a well-established rule, but I doubt that we are prejudiced from reaching what would otherwise be a right result simply because in the minds of some litigants a contrary rule had heretofore "appeared to be established." If the majority's approach were widely accepted, artful claims of past understanding would consistently suffice to frustrate judicial as well as administrative efforts at present rationalization of the law and every precedent—even at the tax court level—might lay claim to such authority that the Government and the tax bar could afford to leave no case unappealed.

B

Of course, the reliance argument is doubly infirm if the majority's rule cannot be said to have "appeared to be established." Did Byrum have a sound basis for calculating that there was no substantial risk of taxation when he persisted in retaining the powers and privileges described above?

1. Again the majority turns to *Reinecke* v. *Northern Trust*, but it is no more credible to use *Northern Trust* as a foundation for Byrum's § 2036 (a)(2) position than it was to use it as a basis for the Court's § 2036 (a)(1) argument. *Northern Trust* was decided on January 2, 1929, two years and three months before Congress passed the first version of § 2036 (a)(2). Section 402 (c) of the Act of 1921, the provision under which *Northern Trust* was decided, proscribed only transfers in which the settlor attempted to retain "possession or enjoyment" until his death. It is thus not surprising that *Northern Trust* focused on the question of the settlor's "power to recall the property and of control over it *for his own benefit*," 278 U. S., at 347 (emphasis added), and made no mention of possible tax liability because of a retained power to designate which beneficiaries would enjoy the trust income. A holding in this context cannot be precedent of "weight" for a decision as to the efficacy of a trust agreement made—as this trust was—27 years after § 2036 (a)(2) was enacted.

I note also that *Northern Trust* rests on a conceptual framework now rejected in modern law. The case is the elder sibling of *May* v. *Heiner*, 281 U. S. 238 (1930), a three-page 1930 decision which quotes *Northern Trust*, at length. *May* in effect held that under § 402 (c) a settlor may be considered to have fully alienated property from himself even if he retains the very substantial string of the right to income from the property so long as he survives. The logic of *May* v. *Heiner* is the logic of *Northern Trust*. As one authority has written:

> "When retention of a life estate was not taxable under the rule of *May* v. *Heiner*, it followed that mere retention of a right to designate the persons to receive the income during the life of the settlor was not taxable . . . ." 1 Beveridge, Law of Federal Estate Taxation, § 8.06, p. 324.

That logic no longer survives. When three Supreme Court *per curiams* affirmed *May* on March 2, 1931, and thus indicated that this view would not be confined to its facts, the treasury, on the next morning, wrote Congress imploring it to promptly and finally reject the Court's lenient view of the Estate Tax system. Congress responded by enacting § 2036 (a)(2) that very day. The President signed the law that evening. Thus the holding of *May* and the underlying approach of *Northern Trust* has no present life. I note further that though Congress has refused to permit pre-1931 trusts to be liable to a rule other than that of *May*, in 1949 this Court itself came to the conclusion that *May* was wrong, and effected "a complete rejection" of its reasoning. *Commissioner* v. *Estate of Church*, 335 U. S. 632,[12] 645 (1949).

I seriously doubt that one could confidently rely on *Reinecke* v. *Northern Trust* when Byrum drafted his trust agreement in 1958. This Court is certainly not bound by its logic in 1972. I do not mean any disrespect, but as Mr. Justice Cardozo said about another case, *Northern Trust* is a decision "as mouldy as the grave from which counsel . . . brought it forth to face the light of a new age." Cardozo, The Growth of the Law, p. 132 (1924); Collected Writings, p. 244.

2. The majority argues that there were several lower court cases decided after the enactment of § 2036 (a)(2)

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[12] In considering this and its companion case, *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701 (1949), the Court invited argument on whether *Northern Trust* itself should be overruled. Journal of the Supreme Court, October Term, 1947, pp. 296–297. Though the Court held for the government without having to reach this issue I note that in the 23 years since *Church* and *Spiegel* an opinion of this Court has not once cited, much less relied upon, *Northern Trust*. Mr. Justice Reed, dissenting in *Church* and concurring in *Spiegel*, announced at the time that he thought these cases overruled *Northern Trust*.

upon which Byrum was entitled to rely and it is quite true that cases exist holding that a settlor's retention of the power to invest the assets of a trust does not by itself render the trust taxable under § 2036 (a) (2). But the majority's emphasis of these cases as a proper foundation for Byrum's reliance is doubly wrong. First, it could not have evaded Byrum's attention and should not escape the majority that all cited prior cases—save *King* (the tax court case written four years *after* Byrum structured his trust)—involved retention of power to invest by the settlor's appointment of himself as a trustee; that is, they posed instances in which the settlor's retained power was constrained by a fiduciary obligation to treat the life tenant beneficiaries and remainderman beneficiaries exactly as specified in the trust instrument. Thus the "freedom" to reallocate income between life tenants and remaindermen by, *e. g.*, investing in wasting assets with a high present return and no long-term value, was limited by a judicially enforceable strict standard capable of invocation by the trust beneficiaries by reference to the terms of the trust agreement. See *Jennings* v. *Smith*, 161 F. 2d 74 (CA2 1947), the leading case. Byrum must have realized that the situation he was structuring was quite different. By according himself power of control over the trust income by an indirect means, he kept himself quite free of a fiduciary obligation measured by an ascertainable standard in the trust agreement. Putting aside the question of whether the situation described *should* be distinguished from Byrum's scheme, surely it must be acknowledged that there was an apparent risk that these situations *could* be distinguished by reviewing courts.

Second, the majority's analysis of the case law skips over the uncertainty at the time Byrum was drafting his trust agreement about even the general rule that

a settlor could retain control over a trust's investments if he bound himself as a trustee to an ascertainable method of income distribution. While Byrum and his lawyer were pondering the terms of the trust agreement now in litigation, the First Circuit Court of Appeals was reconsidering whether a settlor could retain power over his trust's investments even when he bound himself to a fiduciary's strictest standards of disinterested obligation to his trust's beneficiaries. Early in 1958 the United States District Court for the District of Massachusetts had ruled that a settlor could not maintain powers of management of a trust even as a trustee without assuming estate tax liability. *State Street Trust Co.* v. *United States*, 160 F. Supp. 877 (1958). The estate's executor appealed this decision and argued it before the First Circuit panel on October 7, 1958. Byrum's trust agreement was made amidst this litigation, on December 8th. On January 23d the First Circuit affirmed the District Court. *Safe Street Trust Co.* v. *United States*, 263 F. 2d 635 (CA1 1959).[13]

The point is not simply that Byrum was on notice that he risked taxability by retaining the powers he retained when he created his trust—though that is true. It is also that within a month of the trust's creation it should have been crystal-clear that Byrum ran a substantial risk of taxation by continued retention of control over the trust's stock. Any retained right can be resigned. That Byrum persisted in holding these rights can only be viewed as an indication of the value he placed upon their enjoyment, and of the tax risk he was willing to assume in order to retain control.

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[13] The First Circuit again shifted its position on this question in *Old Colony Trust Co.* v. *United States*, 423 F. 2d 601 (1970), but this change is obviously irrelevant to the majority's argument as to the legitimacy of Byrum's reliance from 1958 to 1964.

The perception that a settlor ran substantial risk of estate tax if he insisted on retaining power over the flow of trust income is hardly some subtle divination of a latter-day observor of the 1958–1959 tax landscape. Contemporary observors saw the same thing. A summary of the field in the 1959 Tax Law Review concluded: "Until the law is made more definite, a grantor who retains any management powers is proceeding at his own risk. . . . [T]here is no certainty. . . ." Gray and Covey, State Street—A Case Study of Sections 2036 (a)(2) and 2038, 15 Tax Law Review 75, 102 (1959). The relevant subcommittee of the American Bar Association Committee on Estate and Tax Planning hardly thought reliance appropriate. It wrote in 1960 that:

> "The tax-wise draftsman must now undertake to review every living trust in his office intended to be excluded from the settlor's estate in which the settlor acts as a trustee with authority to:
> "1. Exercise broad and virtually unlimited investment powers . . . ." Tax-Wise Drafting of Fiduciary Powers, 4 Tax Counsellor's Quarterly, 333 336 (1960).

More could be said, but I think it is clear that the majority should find no solace in its reliance argument.

V

The majority, I repeat, has erred in every substantial respect. It remains only to note that if it is wrong in *any* substantial respect—*i. e.,* either in its § 2036 (a)(1) or (a)(2) arguments—Byrum's trust is by law liable to taxation.